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# Death Penalty Drugs and the International Moral Marketplace

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# Death Penalty Drugs and the International Moral Marketplace

JAMES GIBSON\* AND CORINNA BARRETT LAIN\*\*

*Across the country, executions have become increasingly problematic as states have found it more and more difficult to procure the drugs they need for lethal injection. At first blush, the drug shortage appears to be the result of pharmaceutical industry norms; companies that make drugs for healing (mostly in Europe) have refused to be merchants of death. But closer inspection reveals that European governments are the true change agents here. For decades, those governments have tried—and failed—to promote abolition of the death penalty through traditional instruments of international law. Turns out that the best way to export their abolitionist norms was to stop exporting their drugs.*

*At least three lessons follow. First, while the Supreme Court heatedly debates the use of international norms in Eighth Amendment jurisprudence, that debate has become a largely academic sideshow; in the death penalty context, the market has replaced the positive law as the primary means by which international norms constrain domestic death penalty practice. Second, international norms may have entered the United States through the moral marketplace, but from there they have seeped into the zeitgeist, impacting the domestic death penalty discourse in significant and lasting ways. Finally, international norms have had such a pervasive effect on the death penalty in practice that they are now poised to influence even seemingly domestic Eighth Amendment doctrine. In the death penalty context, international norms are having an impact—through the market, through culture, and ultimately through doctrine—whether we formally recognize their influence or not.*

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INTRODUCTION

For a good fifty years, the American death penalty has stood as a prime example of the limits of international law.<sup>1</sup> Despite a variety of international human rights instruments calling for the abolition of capital punishment world-

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1. See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 119–27 (2005) (discussing the standard critique that international law in general, and international human rights instruments in particular, have little influence on states’ behavior); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1398 (1999) (discussing the “common, skeptical view of human rights enforcement” that international human rights law is enforced “not at all, or hardly at all”); Saira Mohamed, *The Death Penalty in the United States and the Force of Regional Human Rights Law*, VERDICT (May 14, 2014), <https://verdict.justia.com/2014/05/14/death-penalty-united-states-force-regional-human-rights-law> (noting “the common complaint that human rights law (and international law more generally) affects states only when they choose to be affected”).

wide,<sup>2</sup> the death penalty in the United States has remained firmly entrenched and relatively impervious to the mounting world opinion against it.<sup>3</sup> By and large, Americans have not even noticed.<sup>4</sup>

Until now. Across the country, executions have become increasingly problematic as states have found it more and more difficult to procure the drugs used in lethal injection. European drug manufacturers have refused to supply them and have told us the reason why: they are vehemently opposed to capital punishment and the use of their products in the imposition of death.<sup>5</sup>

But what looks to be a simple case of pharmaceutical company norms is actually a much richer tale of morality in the marketplace. Closer inspection reveals that European governments are the true instigators here, using private firms as their agents in the international market for death penalty drugs. Where traditional instruments of international human rights norms have failed, the market has succeeded. Turns out, the best way for Europe to export its anti-death-penalty norms was to stop exporting its drugs.

The notion of the market as a venue for expressing international norms is hardly new. Trade sanctions have long been used to curb objectionable nation-state behavior, and one need only think of the global response to apartheid in South Africa to recognize the international reach of the moral marketplace.<sup>6</sup> What is new is the use of the market mechanism in the death penalty context—and its stunning success. Through government pressure on pharmaceutical companies, and later the imposition of export controls, European abolitionist norms have had an unprecedented impact. In the space of a few years, the international moral marketplace has done more to upset the administration of the death penalty in the United States than all of Europe's efforts over the past several decades combined.

So viewed, today's death penalty illustrates the fusion of two paradigms of intellectual thought. One is Harold Koh's theory of "transnational legal process," which explains how various expressions of international law can make their way into a nation's domestic sphere.<sup>7</sup> According to Koh, repeated interac-

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2. For a discussion of these instruments, see *infra* Part II.A.

3. See generally Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002) (remarking upon, and discussing reasons for, American exceptionalism on the death penalty despite weight of international opinion against it).

4. See Int'l Comm'n of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RRS. Q. 165, 188 (1997) (noting "a general lack of awareness on the part of State officials—and even amongst judges, lawyers, and teachers—of the obligations [relating to capital punishment] undertaken by the US Government under international instruments that the country has ratified"). For a discussion of the point in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), see *infra* note 126.

5. For Big Pharma's opposition to the use of its products in the imposition of death, see *infra* Part I.A. For the international norms driving that opposition, see *infra* Part II.B.

6. For a detailed account, see AUDIE KLOTZ, *NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID* (1st ed. 1995).

7. See Koh, *supra* note 1, at 1399. For additional work expounding upon this theory, see generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh,

tion among transnational actors in various “law-declaring fora” will generate rules of international law, which then can be internalized into a nation’s legal system in various ways.<sup>8</sup> The other is Larry Lessig’s seminal work on behavior-regulating modalities.<sup>9</sup> According to Lessig, such law-declaring fora are but one type of regulatory means by which values are conveyed and imposed; behavior may be constrained by other modalities as well, such as the market and social norms.<sup>10</sup>

America’s death penalty shows what happens when Koh’s transnational legal process moves not through traditional law-declaring fora, but the modality of the market instead. The actors in our story are those that Koh identifies—nation-states, NGOs, etc. Nothing new there. But the means by which those actors are conveying their opposition to the death penalty is both new and much more effective. The result is a Lessig twist on Koh, a curious case of the moral marketplace as a uniquely powerful modality for the transmission of international abolitionist norms.

That said, the story of international norms seeping into the United States through the moral marketplace does more than allow us to connect two distinct paradigms of intellectual thought. For those who study capital punishment, at least three lessons follow: one jurisprudential, one cultural, and one doctrinal.

First, the jurisprudential point. The transmission of international norms through the moral marketplace has taken one of the most high-profile debates in constitutional jurisprudence—whether international norms should be considered when interpreting domestic law<sup>11</sup>—and made it into a largely academic side-show. While Supreme Court Justices trade acerbic barbs about whether the views of foreigners should affect the law of capital punishment, those views have had an effect by other means. In the death penalty context, at least, the positive law is no longer the primary modality through which international norms constrain states’ behavior. The market has taken its place.

Next, the cultural point. Although the port of entry for international abolitionist norms has been the marketplace, from there those norms have seeped into the zeitgeist, impacting the domestic death penalty discourse in several ways.

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Address, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). We expand on Koh’s theory *infra* notes 120–21, 278 and accompanying text.

8. See Koh, *Bringing International Law Home*, *supra* note 7, at 626 (“By transnational legal process, I mean the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation’s domestic legal system.”).

9. See Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999). For a more detailed discussion of Lessig’s work, see *infra* note 169 and accompanying text.

10. See Lessig, *supra* note 9, at 507.

11. For a discussion of this debate, see *infra* Part III.A.1.

They have brought a salience to American exceptionalism on the death penalty, forcing the public to recognize the dissonance between domestic and international capital punishment norms. They have ushered a human rights critique into the mainstream death penalty debate. And they have brought renewed attention to the death penalty itself, creating space in the discourse to discuss its other perceived shortcomings. In short, foreign norms may have entered the United States through the market, but they have since found expression in another of Lessig's behavior-regulating modalities—culture.

Finally, the doctrinal point. International anti-death-penalty norms have so thoroughly pervaded our market and culture that those norms are now poised to influence the way existing Eighth Amendment doctrine plays out. Declining executions, splintered approaches to lethal injection protocols, states abandoning the death penalty altogether—these considerations and more factor into the Supreme Court's Eighth Amendment doctrine, providing a backdoor through which international norms can exert their influence.

To be clear, we do not claim that international norms are the only force bringing today's death penalty to its knees. On the contrary, we recognize a long line of problems that have plagued the death penalty over the past decade—death row exonerations, exorbitant cost, grossly inadequate counsel, and continuing evidence of racial discrimination being chief among them—with the shortage of death penalty drugs being yet another snafu to add to the list. Similarly, we do not claim that international norms are the only anti-death-penalty norms at work. Surely the domestic abolition movement plays a part in our story, as does the medical community's anti-death-penalty stance.

Rather, our claim is this. Although traditional instruments of international law have been famously ineffective at forcing American compliance with international anti-death-penalty norms, those norms are nevertheless having an impact through the moral marketplace, which in turn is impacting domestic culture, which in turn stands to impact death penalty doctrine itself. And all of that is true whether our law formally recognizes those norms or not.

The Article proceeds as follows. In Part I, we tell the story of the shortage of death penalty drugs as a product of the moral marketplace, and the mess the states have made in their attempts to respond. In Part II, we examine the numerous (and largely fruitless) instruments of international law previously used to export international abolitionist norms and show how the moral marketplace is actually the result of foreign governments turning to the market to export those norms instead. Having shown the market to be a particularly powerful modality for transmitting abolitionist norms, we turn in Part III to the jurisprudential, cultural, and doctrinal lessons for capital punishment. While a debate rages over the propriety of importing international norms into distinctly domestic areas of concern, the reality in the capital punishment context is that they are already there, exercising influence through the market's effect on the administration of the death penalty itself.

## I. MORALITY IN THE MARKETPLACE FOR DEATH PENALTY DRUGS

We begin with a recent, unexpected development in the world of capital punishment: the shortage of drugs traditionally used in lethal injections. The shortage began when major pharmaceutical companies refused, ostensibly on moral grounds, to sell their products for use in capital punishment. As we will see, this unprecedented move wreaked havoc with execution schedules, repeated itself again and again as new drugs were tried, and caused corrections officials to react in ways that sowed even more chaos in the administration of the death penalty in the United States.

### A. THE THIOPENTAL SCRAMBLE

The date was September 27, 2010, and Scott Kernan had a problem. He and his fellow California corrections officials were scheduled to execute Albert Greenwood Brown in three days—the first execution to take place in the state since a federal court imposed a moratorium nearly five years earlier.<sup>12</sup> But California carried out its executions via lethal injection, using a specific three-drug cocktail.<sup>13</sup> And its cache of one of those three drugs, sodium thiopental, had just passed its expiration date.<sup>14</sup>

Normally this would not have been cause for alarm. States had been using sodium thiopental (thiopental, for short) since the very first execution by lethal injection in 1982,<sup>15</sup> with the sole supplier being an Illinois company named Hospira.<sup>16</sup> Indeed, Hospira supplied not only thiopental, but also the other two drugs in the standard lethal injection cocktail, pancuronium bromide and potassium chloride.<sup>17</sup> This time, however, the cupboard was bare; the company was out of thiopental. It blamed the shortage on a lack of raw materials further up the supply chain (which was true),<sup>18</sup> and it asked California and its other

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12. See Paul Elias, *Judge Clears Way for 1st Calif Execution Since '06*, VENTURA COUNTY STAR (Sept. 24, 2010, 4:43 PM), <http://www.vcstar.com/news/judge-set-to-decide-if-calif-can-resume>.

13. California finally abandoned its three-drug lethal injection protocol in 2013. See Maura Dolan, *California Will No Longer Pursue Three-Drug Lethal Injections*, L.A. TIMES (July 10, 2013), <http://articles.latimes.com/2013/jul/10/local/la-me-ln-lethal-injection-20130710>.

14. See *Calif. Obtains New Supply of Lethal Injection Drug*, SEATTLE TIMES (Oct. 7, 2010, 6:50 PM) [http://seattletimes.com/html/nationworld/2013092384\\_apuscaliforniaexecutions.html](http://seattletimes.com/html/nationworld/2013092384_apuscaliforniaexecutions.html).

15. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 428–29 (1997).

16. See Chris McGreal, *Lethal Injection Drug Production Ends in the US*, GUARDIAN (Jan. 23, 2011, 1:17 PM), <http://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira>. For reasons unrelated to the death penalty, injectable pharmaceuticals often have only one domestic producer, which makes them particularly susceptible to supply disruptions. See Bruce A. Chabner, *Drug Shortages—A Critical Challenge for the Generic-Drug Market*, 365 NEW ENG. J. MED. 2147, 2147–49 (2011) (explaining problem both generally and as applied to cancer medications).

17. See Andrew Welsh-Huggins, *Shortage of Drugs Holds Up Some U.S. Executions*, NBC NEWS (Sept. 27, 2010, 3:15 PM), [http://www.nbcnews.com/id/39385026/ns/health-health\\_care/t/shortage-drug-holds-some-us-executions](http://www.nbcnews.com/id/39385026/ns/health-health_care/t/shortage-drug-holds-some-us-executions).

18. For several years, various production problems have caused a shortage of injectable generic drugs, including anesthetics. See Chabner, *supra* note 16, at 2147–48; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-194, DRUG SHORTAGES: PUBLIC HEALTH THREAT CONTINUES, DESPITE EFFORTS TO HELP



customers to be patient.<sup>19</sup>

Customers' patience, however, was wearing thin. Hospira had originally promised to get thiopental back on the market by July 2010, but that date had later slipped to October, and now Hospira was saying early 2011.<sup>20</sup> That was too late for Brown's execution.

When it became clear that Hospira could not help, Kernan and other California officials began a nationwide search for other sources of thiopental. They contacted corrections officers in other states, a hundred hospitals and surgery centers, and federal agencies ranging from the Drug Enforcement Administration (DEA) to the Department of Veteran's Affairs.<sup>21</sup> The search was particularly vexing because an alternative anesthetic, propofol, was also in short supply, which meant that there was even more demand for thiopental than usual.<sup>22</sup>

Eventually, however, the efforts paid off. Just a week after Brown was supposed to have been executed, California announced that the problem had been solved; it had obtained enough thiopental to go forward with the execution.<sup>23</sup> Although officials refused to identify the supplier, it was later revealed to be the State of Arizona, which had swapped some of its thiopental for some of California's pancuronium bromide.<sup>24</sup>

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ENSURE PRODUCT AVAILABILITY 14 fig.4, 21 (2014) (charting the number of active drug shortages from January 2007 through June 2013 and finding that the immediate cause of drug shortages is traceable to slow or halted production of drugs). As Debby Denno notes, Hospira was one of the drug manufacturers interviewed for the GAO report. Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1336 n.26 (2014).

19. See Welsh-Huggins, *supra* note 17.

20. See *id.*

21. See E-mail from Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab., to John McAuliffe, Corr. Counselor, Cal. Dep't of Corr. & Rehab. (July 8, 2010, 12:28 PST), *available at* [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/aclu\\_v.\\_cdcr/heavily\\_redacted\\_content\\_unknown.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/aclu_v._cdcr/heavily_redacted_content_unknown.pdf) (other states); E-mail from John McAuliffe, Corr. Counselor, Cal. Dep't of Corr. & Rehab. to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Sept. 29, 2010, 15:37 PST), *available at* [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/aclu\\_v.\\_cdcr/1.4.11\\_responsive\\_documents\\_1\\_of\\_2.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/aclu_v._cdcr/1.4.11_responsive_documents_1_of_2.pdf) (hospitals); E-mail from John McAuliffe, Corr. Counselor, Cal. Dep't of Corr. & Rehab. to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Aug. 17, 2010, 12:44 PST), *available at* [https://www.aclunc.org/sites/default/files/dea\\_communication\\_with\\_and\\_about.pdf](https://www.aclunc.org/sites/default/files/dea_communication_with_and_about.pdf) (DEA); E-mail from Matt Cate, Sec'y, Cal. Dep't of Corr. & Rehab., to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Sept. 29, 2010, 15:45 PST), *available at* [https://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/aclu\\_v.\\_cdcr/1.4.11\\_responsive\\_documents\\_1\\_of\\_2.pdf](https://www.aclunc.org/docs/criminal_justice/death_penalty/aclu_v._cdcr/1.4.11_responsive_documents_1_of_2.pdf) (DVA).

22. See Letter from Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab., to Office of Diversion Control, Drug Enforcement Admin. (Aug. 18, 2010) (on file with authors).

23. See *Calif. Obtains New Supply of Lethal Injection Drug*, *supra* note 14.

24. See E-mail from Charles Flanagan, Deputy Dir., Ariz. Dep't of Corr., to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Sept. 29, 2010, 16:40 PST) (on file with authors). As it happens, a similar scenario was playing out with regard to pancuronium bromide. Since 2010, Hospira had been the drug's only domestic manufacturer, see *Drug Shortages: Pancuronium Injection*, AM. SOC'Y OF HEALTH-SYSTEM PHARMACISTS, <http://www.ashp.org/menu/DrugShortages/CurrentShortages/Bulletin.aspx?id=851> (last visited Jan. 29, 2015), and its shortages had put various executions on hold beginning that same year, see Kristin M. Hall, *Tenn. Mum on Search for New Lethal Injection Drugs*,

Albert Greenwood Brown could finally be put to death. “You guys,” Kernan wrote to his Arizona counterpart, “are life savers.”<sup>25</sup>

This same scenario played out all over the country. Every one of the thirty-five states that authorized the death penalty employed lethal injection, and every lethal injection protocol included thiopental.<sup>26</sup> So everyone began to feel the scarcity—particularly the nine states that had executions scheduled before the end of January 2011, which was when Hospira said it would have the drug available again.<sup>27</sup>

Following California’s lead, states first looked to each other for help. Kentucky contacted more than two dozen states, plus the Federal Bureau of Prisons, before ultimately finding a few grams in Georgia.<sup>28</sup> Georgia officials got some from Tennessee, as did Arkansas.<sup>29</sup> Arkansas shared its supply with Oklahoma and Mississippi and then sent some back to Tennessee.<sup>30</sup> And like the California–Arizona deal, most of these transactions involved no monetary payment; states were just helping one another out. As an Arkansas official remarked, “[T]here would be a payback when needed.”<sup>31</sup>

Then, in January 2011, the axe fell. That was when Hospira had promised an end to the shortage. Instead, the company made the situation permanent: it announced that it was exiting the thiopental trade altogether.<sup>32</sup>

In retrospect, there had been warning signs. Earlier in the year, the company had publicly objected to the use of its products in lethal injection.<sup>33</sup> And death penalty experts had wondered if there was more behind the shortage than a lack

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WBIR-TV KNOXVILLE (Jan. 13, 2013, 4:38 PM), <http://archive.wbir.com/rss/article/249516/2/Tenn-mum-on-search-for-new-lethal-injection-drugs> (discussing executions on hold in Tennessee); Michael Kiefer, *Drug Shortage Putting Hold on Lethal Injections*, ARIZ. REPUBLIC (July 8, 2010, 12:00 AM), <http://archive.azcentral.com/arizonarepublic/local/articles/20100708drug-shortage-putting-hold-on-lethal-injections.html> (discussing executions on hold in Arizona).

25. E-mail from Scott Kernan, Undersec’y of Operations, Cal. Dep’t of Corr. & Rehab., to Charles Flanagan, Deputy Dir., Ariz. Dep’t of Corr. (Sept. 29, 2010, 16:57 PST) (on file with authors).

26. See Welsh-Huggins, *supra* note 17. Two of the thirty-five states, Ohio and Washington, used a lethal dose of thiopental in executions. The other thirty-three used thiopental to anesthetize the inmate and then two other drugs to cause death. *Id.*; see also *infra* text accompanying note 41 (explaining three-drug cocktail).

27. See Welsh-Huggins, *supra* note 17.

28. See *States Beg, Borrow and Import Scarce Execution Drug*, THE RECORD.COM (Mar. 25, 2011), <http://www.therecord.com/news-story/2575664-states-beg-borrow-and-import-scarce-execution-drug>.

29. See *id.*

30. See *id.*

31. *Id.*

32. Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ (sodium thiopental) Market Exit (Jan. 21, 2011), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle\\_print&ID=1518610](http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle_print&ID=1518610).

33. See *Drug Shortage Delays Some Lethal Injections*, WASH. POST (Sept. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092707104.html> (noting that Hospira has made clear it objects to the use of its products in executions); *Hospira Position on Use of Our Products in Lethal Injections*, HOSPIRA, [http://www.hospira.com/en/about\\_hospira/government\\_affairs/hospira\\_position\\_on\\_use\\_of\\_our\\_products/index](http://www.hospira.com/en/about_hospira/government_affairs/hospira_position_on_use_of_our_products/index) (last visited Apr. 2, 2015) (“Hospira makes its products to enhance and save the lives of the patients we serve, and, therefore, we have always publicly objected to the use of any of our products in capital punishment.”).

of raw materials.<sup>34</sup> Hospira's January 2011 announcement confirmed those suspicions. The company's claim that it had "never condoned" thiopental's use in executions did not exactly ring true, given that it had long been the drug's sole supplier and had privately assured corrections officials that it was working to end the shortage.<sup>35</sup> But its position was now crystal clear: the company no longer wanted to be associated with capital punishment.<sup>36</sup> It was official. Hospira was out.<sup>37</sup>

Hospira's withdrawal from the market left states in a bind. Not only was thiopental a drug that they had used in executions for decades, but it had also been blessed by the Supreme Court in *Baze v. Rees*,<sup>38</sup> a 2008 case in which two Kentucky inmates claimed that the state's lethal injection protocol created an unconstitutionally high risk of excruciating pain.<sup>39</sup> Kentucky's protocol used the same three-drug cocktail as most every other death penalty state: thiopental to render the inmate unconscious, followed by pancuronium bromide to induce paralysis and halt breathing, and potassium chloride to cause cardiac arrest.<sup>40</sup> Although corrections officials nationwide breathed a collective sigh of relief when Kentucky prevailed in the Supreme Court, the Court's sanction of the particulars of Kentucky's protocol gave them a new reason to worry: it was Kentucky's use of thiopental that had ensured that the other two drugs in its protocol did not create an unconstitutional risk of severe pain.<sup>41</sup>

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34. See Welsh-Huggins, *supra* note 17; *Drug Shortage Delays Some Lethal Injections*, *supra* note 33.

35. See Letter from Ellen Hessen, Gen. Counsel, Office of the Governor, to Juliana Reed, Vice President, Gov't Affairs, Hospira, Inc. (Aug. 23, 2010) (on file with authors) (summarizing phone call about the provision of thiopental for "several pending cases in Kentucky" and referencing letter from Kentucky Department of Corrections to Hospira discussing need for thiopental because "Kentucky's protocol for lethal injection includes the administration of sodium thiopental . . . [and] the Commonwealth has pending several actions dependent upon the availability of this drug.").

36. Press Release, Hospira, Inc., *supra* note 32 (registering regret that the drug would no longer be available to "our many hospital customers who use the drug for its well-established medical benefits" but averring that "we could not prevent the drug from being diverted to departments of corrections for use in capital punishment").

37. As for the pancuronium bromide shortage discussed *supra* note 24, the company never officially announced that it was exiting that market, but it may as well have. Like thiopental, the drug has been unavailable for years; Hospira lists it as "out of stock." *Pancuronium Bromide Injection, USP*, HOSPIRA, [http://www.hospira.com/products\\_and\\_services/drugs/PANCURONIUM\\_BROMIDE](http://www.hospira.com/products_and_services/drugs/PANCURONIUM_BROMIDE) (last visited July 11, 2014).

38. 553 U.S. 35 (2008). As we discuss *infra* Part III.C.3, the drug shortage and the reasons behind it affect *Baze*'s jurisprudence in surprising ways.

39. See *Baze*, 553 U.S. at 46.

40. See *id.* at 44.

41. Although no single opinion carried a majority, seven of the nine Justices rejected the prisoners' claims by relying on the fact that Kentucky administered thiopental first. Chief Justice Roberts, joined by Justices Kennedy and Alito, spent several pages discussing the cocktail's makeup and the safeguards that Kentucky built into its protocol, including such specifics as drug dosage, personnel training, timing constraints, monitoring efforts, and more. See *id.* at 53–56. Justice Breyer's opinion was similarly detailed, with much attention paid to medical research on the cocktail's efficacy. See *id.* at 109–13 (Breyer, J., concurring in the judgment). Justice Stevens expressed concern over the use of pancuronium bromide but found its use by Kentucky, in combination with thiopental, to be constitutional. See

Without Hospira, there was no domestic producer of thiopental, so states turned to foreign sources. Looking overseas seemed like an easy fix. Although propofol had largely replaced thiopental as the preferred anesthetic for clinical use in the United States,<sup>42</sup> other countries still used thiopental. Indeed, it was (and still is) on the World Health Organization's list of essential medicines.<sup>43</sup> Moreover, states had already had some success with overseas suppliers; the thiopental that Arizona gave to California had been purchased from a British firm,<sup>44</sup> and California had learned of a producer in Pakistan.<sup>45</sup>

Instead of finding an easy fix, however, states found that foreign manufacturers were also hostile to the use of thiopental for lethal injection. Like Hospira, major European pharmaceutical companies objected to selling drugs to those they viewed as merchants of death (or at least objected to transactions that jeopardized their corporate image).<sup>46</sup> Austrian company Sandoz was "ticked off" upon discovering that some of its thiopental had made its way to corrections officers and vowed to impose restrictions on the drug's downstream distribution.<sup>47</sup> A Swiss firm that learned its thiopental had ended up in the hands of Nebraska corrections officials even asked the state to give it back.<sup>48</sup> (Nebraska said no.<sup>49</sup>) Major firms in India and Israel had similar re-

*id.* at 71–87 (Stevens, J., concurring in the judgment). Justice Thomas, joined by Justice Scalia, disagreed with the detailed balancing test the plurality adopted, but still relied on the fact that Kentucky's procedure was "designed to eliminate pain rather than to inflict it"—a tacit recognition that the use of thiopental (the only one of the three drugs that eliminated pain) was essential to the protocol's legality. *See id.* at 107 (Thomas, J., concurring in the judgment). Even the two dissenting Justices, Ginsburg and Souter, did not oppose use of thiopental; they simply would have required further safeguards to ensure that it was having its intended effect. *See id.* at 114 (Ginsburg, J., dissenting).

42. *See* Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704754304576095980790129692>. As we discuss *infra* Part I.B, states eventually turned to other drugs as substitutes for thiopental.

43. *See* WORLD HEALTH ORG., WHO MODEL LIST OF ESSENTIAL MEDICINES (2013), *available at* [http://apps.who.int/iris/bitstream/10665/93142/1/EML\\_18\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/93142/1/EML_18_eng.pdf).

44. *See* Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS (Jan. 6, 2011, 7:13 AM), <http://news.bbc.co.uk/1/hi/9342000/9342976.stm>.

45. *See* Letter from Scott Kernan to Office of Diversion Control, *supra* note 22. The later trade with Arizona suggests that the Pakistani source never worked out.

46. *See, e.g., Germany: No Death Penalty Drug to US*, FOX NEWS (Jan. 24, 2011), <http://www.foxnews.com/world/2011/01/24/german-doctors-sodium-thiopental> (discussing stance of German pharmaceutical firms); *see also infra* note 48–50 (discussing stance of other overseas firms); *Our Philosophy*, HOSPIRA, [http://www.hospira.com/en/about\\_hospira/our\\_philosophy](http://www.hospira.com/en/about_hospira/our_philosophy) (last visited Feb. 19, 2015) (noting that Hospira bases its corporate image on "Advancing Wellness"); Letter from Staffan Schüberg, President, Lundbeck Inc., to Gary C. Mohr, Dir., Ohio Dep't of Rehab. & Corr. (Jan. 26, 2011), *available at* <http://www.deathpenaltyinfo.org/documents/LundbeckLethInj.pdf> (stating that the use of Lundbeck's pentobarbital in executions "contradicts everything we are in business to do").

47. Koppel, *supra* note 42. For more on restrictions on downstream distribution, see *infra* notes 67–68 and accompanying text.

48. *See Company Wants Neb. to Return Lethal Injection Drug*, CNS NEWS (Nov. 29, 2011, 8:35 PM), <http://cnsnews.com/company-wants-neb-return-lethal-injection-drug>.

49. *See Nebraska Refuses to Return Execution Drug to Swiss Company*, PRISON LEGAL NEWS (Nov. 15, 2012), <https://www.prisonlegalnews.org/news/2012/nov/15/nebraska-refuses-to-return-execution-drug-to-swiss-company>. The Swiss company's thiopental had apparently been given as samples to a

actions.<sup>50</sup> And going beyond Big Pharma looked sketchy. Arizona's source in England—and later a source for several other states as well—turned out to be a fly-by-night business called Dream Pharma, run out of the back of a driving school in a low-rent London neighborhood.<sup>51</sup>

Moreover, even if states could find a reliable foreign supplier willing to sell to them, there was another obstacle to importation: thiopental and other death penalty drugs were controlled substances under U.S. law.<sup>52</sup> That meant significant import restrictions, including seizure of drugs from facilities that had not been preapproved through federal inspections.<sup>53</sup> At least, that is what it meant in theory. In practice, federal officials had been quietly facilitating the importation of drugs for lethal injection, restrictions notwithstanding. The DEA had helped states negotiate the import process,<sup>54</sup> and the Food and Drug Administration

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broker in Calcutta, India, who claimed to want to sell the drug in Zambia as an anesthetic, but who instead sold it to Nebraska corrections officials. *Id.* You can't make this stuff up.

50. See David Brunnstrom, *EU Puts Squeeze on Drug Supplies for U.S. Executions*, REUTERS (Dec. 20, 2011, 12:32 PM), <http://www.reuters.com/article/2011/12/20/eu-executions-drugs-idUSL6E7NK30820111220> (noting that the Indian firm Keyem Pharmaceuticals refused to supply thiopental for use in U.S. executions, citing its “ethos of Hinduism”); Makiko Kitamura, *Teva to Block Drug for U.S. Execution Use as Hospira Pressured*, BLOOMBERG (Mar. 20, 2013), <http://www.bloomberg.com/news/articles/2013-03-20/teva-to-block-drug-for-u-s-execution-use-as-hospira-pressured> (noting that Israel's Teva Pharmaceutical Industries refused to supply propofol for use in U.S. executions).

51. Don't believe us? Take a look. *Picture of DreamPharma*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/picture-dreampharma> (last visited Aug. 21, 2014); see also Owen Bowcott, *London Firm Supplied Drugs for US Executions*, GUARDIAN (Jan. 6, 2011, 12:45 PM), <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>; Jeannie Nuss, *Arkansas Latest State to Turn over Execution Drug*, CNS NEWS (July 22, 2011, 2:15 AM), <http://cnsnews.com/news/article/arkansas-latest-state-turn-over-execution-drug> (reporting on the relationship between Dream Pharma and states other than Arizona). Dream Pharma bought the thiopental from a pharmaceutical company called Archimedes Pharma, which was reportedly unaware that its customer intended to sell it for use in executions. See Bowcott, *supra*. Archimedes in turn procured the drug from Sandoz, a division of its Austrian pharma giant Novartis, which like the other Big Pharma companies, objected to the use of its products for executions. See Katie Reid, *Novartis Moves to Stop Execution Drug Reaching US*, REUTERS (Feb. 10, 2011, 4:36 PM), <http://uk.reuters.com/article/2011/02/10/novartis-idUKLDE7191H220110210>. And exports from any British firm would soon become a legal impossibility. See *infra* notes 140–41 and accompanying text.

52. See OFFICE OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMIN., CONTROLLED SUBSTANCES—ALPHABETICAL ORDER 10–13, 14 (2014), available at [http://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](http://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf) (listing thiopental, pentobarbital, phenobarbital, and midazolam as controlled substances).

53. See 21 U.S.C. § 334 (2012) (authorizing seizure); *id.* § 351(j) (designating drug as adulterated if its manufacturer was not inspected). Federal officials were particularly aware of the need to oversee imported drugs after a 2008 incident in which contaminated doses of the anticoagulant heparin were associated with the deaths of more than one hundred Americans. See *FDA Triples Tally of Heparin-Linked Deaths*, CBS NEWS (Apr. 8, 2008, 9:54 PM), <http://www.cbsnews.com/news/fda-triples-tally-of-heparin-linked-deaths>. The agency traced the tainted drug to a Chinese company and admitted that it had failed to follow its policies with regard to inspecting the manufacturing facility. See Gardiner Harris, *Heparin Contamination May Have Been Deliberate*, *F.D.A. Says*, N.Y. TIMES (Apr. 30, 2008), <http://www.nytimes.com/2008/04/30/health/policy/30heparin.html>.

54. See, e.g., E-mail from John McAuliffe, Corr. Counselor, Cal. Dep't of Corr. & Rehab., to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Aug. 17, 2010, 12:44 PST), available at [https://www.aclunc.org/sites/default/files/dea\\_communication\\_with\\_and\\_about.pdf](https://www.aclunc.org/sites/default/files/dea_communication_with_and_about.pdf).

(FDA) had happily released impounded thiopental imports after states explained that they wanted to kill people, not heal them.<sup>55</sup>

With the drug shortage in the spotlight, however, defense teams began to scrutinize importations. In February 2011, lawyers for a death row inmate in Georgia sent a letter to the Department of Justice, alleging that the state had violated the Controlled Substances Act by importing thiopental without registering with the DEA and without filing an import declaration.<sup>56</sup> The increased attention meant the feds knew they could no longer look the other way; the following month the DEA seized Georgia's thiopental supply, and it soon followed with seizures in Arkansas, Kentucky, and Tennessee.<sup>57</sup> The FDA held out longer, claiming that its authority was limited to drugs that promoted health and welfare rather than death,<sup>58</sup> but the U.S. District Court for the District of Columbia disagreed, telling the agency in March 2012 to enforce its drug import regulations and restrictions.<sup>59</sup> As a practical matter, that put an end to imports of thiopental: European companies were already unwilling to supply it, and companies from countries with less of an abolitionist bent—for example, China—would have trouble satisfying the FDA's newly enforced branding, approval, and registration requirements.<sup>60</sup>

With each passing day, then, states found it harder and harder to find a reliable source of thiopental and watched their remaining supplies dwindle toward expiration.<sup>61</sup> The most obvious solution? Get a new drug. Of course,

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55. See *Cook v. FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013).

56. See Letter from John T. Bentivoglio, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, to Eric H. Holder, Attorney Gen., U.S. Dep't of Justice (Feb. 24, 2011) (on file with authors); see also 21 U.S.C. § 952(b) (2012) (forbidding importation of controlled substances without registration and declaration).

57. See Nuss, *supra* note 51.

58. See Andrew Welsh-Huggins, *FDA Has Helped Two States Obtain Anesthetic Used in Executions*, WASH. POST (Jan. 13, 2011), [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/12/AR2011011206153\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/12/AR2011011206153_pf.html).

59. See *Beatty v. FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012), *aff'd in part, rev'd in part sub nom. Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013). The district court had also ordered the FDA to recover all unapproved foreign thiopental from the states, see Order, *Beatty v. FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012) (No. 11-289), ECF No. 24; 21 U.S.C. § 381(a) (2012) (requiring unapproved drugs to be refused admission to country), but this part of its ruling was reversed on appeal, see *Cook*, 733 F.3d at 12.

60. As the D.C. Circuit held in affirming the district court's rejection of the FDA's "hands off" policy:

The FDCA imposes mandatory duties upon the agency charged with its enforcement. The FDA acted in derogation of those duties by permitting the importation of thiopental, a concededly misbranded and unapproved new drug, and by declaring that it would not in the future sample and examine foreign shipments of the drug despite knowing they may have been prepared in an unregistered establishment.

*Cook*, 733 F.3d at 12.

61. Thiopental can last up to four years after manufacture, which is considered a long shelf life. See Larry Greenemeier, *Cruel and Usual?: Is Capital Punishment by Lethal Injection Quick and Painless?*, Sci. AM. (Oct. 27, 2010), <http://www.scientificamerican.com/article/capital-punishment-by-lethal-injection>. This may explain why a handful of states were able to keep using thiopental in their execution

deviating from the *Baze*-approved cocktail meant risking more constitutional challenges.<sup>62</sup> But as it became increasingly apparent that a steady source of thiopental might never be found, states felt they had no choice. As one director of corrections observed, people in his position were tasked to carry out executions. State law, he noted, “doesn’t say, ‘Try your best.’ It says, ‘You have to do this.’”<sup>63</sup>

#### B. SUBSTITUTE DRUGS

When corrections officials bowed to the inevitable and started seeking alternatives to thiopental, they discovered that instead of solving the problem, they were multiplying it. With each new drug came new stated objections from pharmaceutical companies, and the story repeated itself again and again.

The alternative drug of choice was pentobarbital. Like thiopental, pentobarbital is a short-acting barbiturate, but unlike thiopental, it was still in wide use and thus should have been easy to acquire.<sup>64</sup> In 2011 alone, thirteen states changed their protocols, substituting pentobarbital for thiopental.<sup>65</sup> By the following year, pentobarbital had surpassed thiopental as the anesthetic most often used in executions.<sup>66</sup>

For states that made the move to pentobarbital, however, an all-too-familiar problem soon arose: objections from Big Pharma. The only form of injectable pentobarbital available in the United States was manufactured by the Danish

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protocols as late as 2013, *see* Denno, *supra* note 18, at 1359, despite the fact that its mass-market availability ended in early 2011. In contrast, pentobarbital (the drug that largely replaced thiopental, *see infra* Part I.B) has a shelf life of only two or three years. *See* Della Hasselle, *Have Louisiana's Lethal Injection Drugs Expired? Records Unavailable*, LENS (Apr. 30, 2013, 11:04 AM), <http://thelensnola.org/2013/04/30/have-louisianas-lethal-injection-drugs-expired-paper-chase-ends-with-state-claiming-it-lacks-pertinent-records>. Two or four years may seem like a long time, but it is the blink of an eye when compared to the time it takes for a capital case to work its way through the system, which for 2011's executions was an average of 16.5 years. *See* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2011 – STATISTICAL TABLES 14 tbl.10 (2014); *Why So Many Death Row Inmates in America Will Die of Old Age*, ECONOMIST (Feb. 3, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/02/economist-explains-0>. And once corrections officers combine a drug with a liquid for injection, it expires within days, which makes last-minute stays of execution particularly taxing on states' drug supplies. *See* Greenemeier, *supra*.

62. In some states, like California, changing the drug protocol brought procedural challenges as well. *See* *Sims v. Dep't of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409, 428–29 (Cal. Ct. App. 2013) (enjoining all lethal injections in California “unless and until new regulations governing lethal injection execution are promulgated in compliance with the [California Administrative Procedure Act]”).

63. Laura Sullivan, *Missouri Execution Stalled over Lethal Drugs in Short Supply*, NPR (Feb. 18, 2014, 6:39 PM), <http://www.npr.org/2014/02/18/279216377/missouri-execution-stalled-over-lethal-drugs-in-short-supply>.

64. *See* Greg Bluestein, *Replacement Execution Drug Ample, but Has Issues*, SAN DIEGO UNION-TRIB. (Mar. 2, 2011, 12:45 PM), <http://www.utsandiego.com/news/2011/mar/02/replacement-execution-drug-ample-but-has-issues>.

65. Denno, *supra* note 18, at 1358–59.

66. *Id.*

company Lundbeck.<sup>67</sup> Lundbeck was not happy to hear that its medical product was now being used in executions, and it sent letters to departments of corrections stating that it was “adamantly opposed” to such use and urging its cessation.<sup>68</sup> When those pleas went unheeded, the company took a different tack: in July 2011 it abandoned its standard distribution system in favor of a tightly controlled “drop ship program” with end-user agreements.<sup>69</sup> Under the new system, pentobarbital purchasers had to agree not to redistribute the drug without Lundbeck’s express authorization and not to make the drug available for use in capital punishment.<sup>70</sup> With that, the sole producer of pentobarbital in the United States had extricated itself from the market for death penalty drugs.<sup>71</sup>

The other obvious substitute drug was propofol. Perhaps best known as the drug that killed Michael Jackson, propofol was in fact a popular anesthetic that had largely supplanted thiopental in domestic clinical use.<sup>72</sup> Yet despite its widespread availability, all it took was one state switching to propofol for its manufacturer to put the kibosh on its use in lethal injection.

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67. See David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, N.Y. TIMES (July 1, 2011), <http://www.nytimes.com/2011/07/02/world/europe/02execute.html>.

68. See, e.g., Letter from Staffan Schüberg to Gary C. Mohr, *supra* note 46; see also Kimberly Leonard, *Lethal Injection Drug Access Could Put Executions on Hold*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2012/04/04/8589/lethal-injection-drug-access-could-put-executions-hold> (noting that Lundbeck sent letters to governors and correctional departments in sixteen states “saying it did not want its drug used for executions”); Emma Marris, *Death-Row Drug Dilemma*, NATURE (Jan. 27, 2011), <http://www.nature.com/news/2011/110127/full/news.2011.53.html> (quoting spokesperson for Lundbeck as stating, “The use of our product to end lives contradicts everything we are in business to do.”).

69. Under the drop ship program, Lundbeck reviews all orders of pentobarbital prior to clearing its shipment through an exclusive supplier, rather than using distributors to fill orders. See Press Release, Lundbeck, Inc., Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (July 1, 2011), available at [http://files.shareholder.com/downloads/AMDA-GGC00/3611712207x0x500520/5ab4436c-feb-4d0a-923e-affa06db411c/LUN\\_News\\_2011\\_7\\_1\\_Press\\_Releases.pdf](http://files.shareholder.com/downloads/AMDA-GGC00/3611712207x0x500520/5ab4436c-feb-4d0a-923e-affa06db411c/LUN_News_2011_7_1_Press_Releases.pdf).

70. See *id.* Other firms adopted similar restrictions. See Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. WORLD AFF. 27, 31 (2014) (listing Teva, West-Ward, Par Pharmaceuticals, Naari, Sandoz, Merck, Fresenius Kabi, Siegfried, Sun Pharma, and Tamarang).

71. In December 2011, Lundbeck extracted itself from the production of pentobarbital altogether, selling that portion of its business to Akorn Inc. on the condition that Akorn would continue with its restricted distribution program. See Press Release, Lundbeck, Inc., Lundbeck Divests Several Products in the US as Part of Long-Term Business Strategy (Dec. 22, 2011), available at [http://files.shareholder.com/downloads/AMDA-GGC00/3611712207x0x530234/285e0560-77f6-4de1-8174-6f76a45194fc/Press\\_release.pdf](http://files.shareholder.com/downloads/AMDA-GGC00/3611712207x0x530234/285e0560-77f6-4de1-8174-6f76a45194fc/Press_release.pdf); see also *Missouri Execution: Pharmacy Will Not Supply Compounded Pentobarbital*, GUARDIAN (Feb. 17, 2014, 10:49 PM), <http://www.theguardian.com/world/2014/feb/18/missouri-execution-pharmacy-will-not-supply-compounded-pentobarbital> (noting that Missouri turned to a compounding pharmacy because the only licensed manufacturer of the drug, Akorn, refuses to provide it for lethal injections pursuant to its purchase agreement with Lundbeck).

72. Propofol is one of the world’s most commonly administered anesthetics; it is used some fifty million times annually in the United States alone. See Letter from Scott Meacham, Exec. Vice President & Chief Commercial Officer, Fresenius Kabi USA, LLC, to Healthcare Provider (Aug. 28, 2012), available at <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf>; see also *Michael Jackson Requested Propofol Long Before Death, Says Doctor*, CBS NEWS (Aug. 29, 2013, 8:27 AM), <http://www.cbsnews.com/news/michael-jackson-requested-propofol-long-before-death-says-doctor> (reporting death of Michael Jackson due to overdose of propofol).



In May 2012, Missouri announced that it would use propofol in an upcoming execution—the first state to do so.<sup>73</sup> The drug’s only active supplier in the United States, German pharmaceutical company Fresenius Kabi,<sup>74</sup> reacted immediately with tighter distribution controls, new end-user agreements for its customers, and a cessation of shipments to the middleman that had supplied Missouri.<sup>75</sup> It also went one step further, contacting health care providers to raise the specter of blocked propofol imports.<sup>76</sup> This resulted in an outcry from the state’s anesthesiologists, who urged Missouri’s corrections department “not to jeopardize the safety of over 50 million patients who rely on this critical medication” and claimed that “[a] shortage . . . will take the medical specialty of anesthesiology back 20 years.”<sup>77</sup> In the end, Missouri’s governor blinked. Just weeks before the first propofol execution was to take place, he ordered a delay and directed his department of corrections to eliminate the drug from its lethal injection protocol.<sup>78</sup> No state has ventured into propofol territory since.<sup>79</sup>

As time passed, this same story played out again and again whenever states experimented with new drug protocols. Arkansas decided to try the barbiturate

73. *Missouri to Use Same Drug Involved in Michael Jackson’s Death for Executions*, FOX NEWS (May 24, 2012), <http://www.foxnews.com/health/2012/05/24/missouri-to-use-same-drug-involved-in-michael-jackson-death-for-executions>.

74. See Alan Scher Zagier, *Maker of Anesthetic Blamed for Michael Jackson’s Death Latest to Block Drug for Execution Use*, 680 NEWS (Sept. 27, 2012, 7:18 PM), <http://www.680news.com/2012/09/27/maker-of-anesthetic-blamed-for-michael-jacksons-death-latest-to-block-drug-for-execution-use>. Hospira also made propofol, but it was no longer distributing it. See *id.* Indeed, at the time, Hospira was in the process of trying to reclaim the propofol that Missouri had managed to get from it. See Jim Salter, *Missouri Gov. Halts 1st US Execution by Propofol*, DENVER POST (Oct. 11, 2013, 10:51 AM), [http://www.denverpost.com/ci\\_24289773](http://www.denverpost.com/ci_24289773).

75. See Kevin Murphy, *Missouri Drops New Execution Drug After European Opposition*, REUTERS (Oct. 11, 2013, 5:18 PM), <http://www.reuters.com/article/2013/10/11/us-usa-execution-drugs-missouri-idUSBRE99A0VV20131011> (discussing suspension of shipments to distributor that supplied Missouri’s Department of Corrections); Letter from Scott Meacham to Healthcare Provider, *supra* note 72 (discussing distribution controls and end-user agreements).

76. See Letter from Scott Meacham to Healthcare Provider, *supra* note 72. For a discussion of export controls, see Part II.B.

77. Statement from Mo. Soc’y of Anesthesiologists on the Use of Propofol in Lethal Injections (Sept. 26, 2013), *available at* <http://www.msahq.com/wp-content/uploads/2013/09/MSA-Statement-on-Use-of-Propofol-in-Lethal-Injections.pdf>.

78. See Salter, *supra* note 74. The state’s propofol ultimately went back to the distributor, which had long claimed that the shipment to Missouri had been a mistake and had asked the state to return it nearly a year earlier. See *id.* But Missouri’s troubles were not over. Its next execution used pentobarbital from a domestic compounding pharmacy, see Abby Ohlheiser, *Missouri Turns to Compounding Pharmacies for Lethal Injection Drugs*, WIRE (Oct. 22, 2013, 6:16 PM), <http://www.thewire.com/national/2013/10/missouri-turns-compounding-pharmacies-lethal-injection-drugs/70821>, a move that led to a lawsuit from an inmate, claiming that the pharmacy’s quality controls were inadequate, see *Complaint, Taylor v. Apothecary Shoppe, LLC*, No. 14-CV-063 (N.D. Okla. filed Feb. 11, 2014). And it was later revealed that Missouri had also begun using the controversial drug midazolam, despite testimony to the contrary from corrections officials. See Chris McDaniel, *State Reveals More Details of Midazolam Use When Inmates Are Executed*, ST. LOUIS PUB. RADIO (Sept. 6, 2014, 10:01 AM), <http://news.stlpublicradio.org/post/state-reveals-more-details-midazolam-use-when-inmates-are-executed>.

79. See *State by State Lethal Injection*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 11, 2014).

phenobarbital hydrochloride, prompting manufacturer Hikma Pharmaceuticals to impose new restrictions on the drug's downstream distribution.<sup>80</sup> Ohio switched to a combination of the sedative midazolam hydrochloride and the painkiller hydromorphone, both of which were made by good old Hospira (among others).<sup>81</sup> Hospira predictably added the drugs to the list of products that its distributors were not allowed to resell to penitentiaries.<sup>82</sup> The message from this newly emergent moral marketplace was clear: when it came to death penalty drugs, states had the demand and European pharmaceutical companies had the supply, but never the twain shall meet.

### C. SECOND-ORDER EFFECTS

With the advent of the moral marketplace came more than just a severe shortage of death penalty drugs. Big Pharma's opposition to the use of its products for lethal injection has also had a series of second-order effects—speed and secrecy chief among them—that have caused even more problems for the administration of capital punishment in the United States.

The initial second-order effect was that states used whatever drugs they had as fast as they possibly could. The rush first began back when the thiopental supply started to dry up. California, as we know, fought hard to execute Albert Greenwood Brown before its batch of thiopental went bad.<sup>83</sup> Kentucky, which

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80. The company issued a statement when it imposed its restrictions stating, "Hikma strongly objects to the use of any of its products in capital punishment." *Hikma Is Latest Firm to Stop Drugs Being Sold for Lethal Injections*, IN-PHARMA TECHNOLOGIST.COM (May 20, 2013), <http://www.in-pharmatechnologist.com/Processing/Hikma-is-Latest-Firm-to-Stop-Drugs-Being-Sold-for-Lethal-Injections> [hereinafter *Hikma*].

81. See Andrew Welsh-Huggins, *Ohio Got Death Penalty Drugs from Maker that Objects to Execution Use*, PRINCE GEORGE CITIZEN (Feb. 20, 2014, 7:18 AM), <http://www.princegeorgecitizen.com/news/world/ohio-got-death-penalty-drugs-from-maker-that-objects-to-execution-use-1.861200>. Indeed, the fact that midazolam has several producers is one of the reasons, perhaps the primary reason, states have continued to use it in their lethal injection protocols.

82. See Andrew Welsh-Huggins, *Family Alleges Ohio Execution Unconstitutional*, YORK DISPATCH (Jan. 25, 2014, 7:45 AM), [http://www.yorkdispatch.com/ci\\_24991983/family-alleges-ohio-execution-unconstitutional](http://www.yorkdispatch.com/ci_24991983/family-alleges-ohio-execution-unconstitutional). In return for its efforts, Hospira was sued by an Ohio prisoner's family. See Complaint, *McGuire v. Mohr*, No. 2:14-CV-00093 (S.D. Ohio filed Jan. 24, 2014) (alleging failure to warn, products liability, negligence, and related claims). In early 2015, another manufacturer of midazolam and hydromorphone hydrochloride, Akorn Pharmaceuticals, instituted downstream controls on those drugs' use in a similar attempt to keep its products out of executioners' hands. See Press Release, Akorn, Inc., Akorn Adopts Comprehensive Policy to Support the Use of Its Products to Promote Human Health (Mar. 4, 2015), available at <http://investors.akorn.com/phoenix.zhtml?c=78132&p=irol-newsArticle&ID=2022522>.

83. See *supra* notes 22–26 and accompanying text (discussing scramble to get death penalty drugs to execute Brown); see also *Morales v. Cate*, 623 F.3d 828, 829 (9th Cir. 2010) ("After a four-year moratorium on executions in California, multiple proceedings in federal court, a state administrative law proceeding, and state court appeals, it is incredible to think that the deliberative process might be driven by the expiration date of the execution drug."). Even after California got the thiopental from Arizona, questions about its execution procedure kept Brown alive. See *Morales v. Cate*, Nos. 5-6-CV-219-JF-HRL, 5-6-CV-926-JF-HRL, 2010 WL 3835655, at \*1 (N.D. Cal. Sept. 28, 2010) (staying execution).

had only executed three people in the previous thirty-plus years,<sup>84</sup> considered executing three in one day when it realized its thiopental stock was expiring.<sup>85</sup> Faced with a similar problem, Arizona executed two prisoners in the same month, something it had not done since 1999.<sup>86</sup> And Missouri executed three prisoners in three months—one of whom was put to death while the Eighth Circuit was still considering his petition for rehearing.<sup>87</sup>

The resort to speed continued when states switched to new drugs. For half a century, Tennessee had been averaging one execution every nine years,<sup>88</sup> but in early 2014, it found a thiopental substitute and hurriedly scheduled ten executions for the following two years.<sup>89</sup> Oklahoma went one better, defeating court challenges to the use of its new drug protocol and then immediately scheduling the execution of two prisoners in one day—something that had not happened since 1937.<sup>90</sup>

Executing prisoners more quickly might not have been a problem in and of itself—if the executions had gone smoothly. But unfortunately for death penalty states, fast-track executions dovetailed with another second-order effect of Big Pharma's intransigence: as states were forced to depart further and further from the three-drug protocol that *Baze* had approved, executions began to go wrong.

84. See Bill Estep, *Killer Is Executed: He Never Gave a Reason for Murderous Rampage*, LEXINGTON HERALD-LEADER (Nov. 22, 2008), [http://www.kentucky.com/2008/11/22/601002\\_killer-is-executed.html](http://www.kentucky.com/2008/11/22/601002_killer-is-executed.html).

85. See *KY Debated Back-to-Back Executions*, WBKO (Jan. 25, 2011, 11:35 PM), <http://www.wbko.com/home/misc/114606609.html>.

86. See *Executions in the U.S. in 1999*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-us-1999> (last visited Apr. 2, 2015) (listing number of Arizona executions by year); Michael Kiefer, *Drug Switch Underscores Arizona's Struggle with Execution Standards*, ARIZ. REPUBLIC (Mar. 27, 2014, 12:54 PM), <http://www.azcentral.com/story/news/arizona/death-row/2014/03/26/arizona-switches-drug-executions-death-row/6914575>.

87. See Andrew Cohen, *America Is Terrible at Killing People Legally*, POLITICO (Feb. 7, 2014), <http://www.politico.com/magazine/story/2014/02/america-is-terrible-at-killing-people-legally-103243.html>; *Execution List 2014*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited Feb. 15, 2015). The absence of a stay meant that Missouri's executions were not illegal, but the state's haste earned its attorneys a sharp rebuke from two federal judges. See Ed Pilkington, *US Judge Attacks States' Lethal Injection Methods as 'High School Chemistry'*, GUARDIAN (Feb. 26, 2014, 1:48 PM), <http://www.theguardian.com/world/2014/feb/26/death-penalty-judge-attacks-lethal-injection-drugs>.

88. See Brian Haas, *TN Makes Unprecedented Push to Execute 10 Killers*, TENNESSEAN (Dec. 5, 2013), <http://www.tennessean.com/article/20131205/NEWS03/312050045/TN-makes-unprecedented-push-execute-10-killers>.

89. See Michael Cass, *State Sets Execution Dates for 10 Men*, TENNESSEAN (Feb. 5, 2014, 3:08 PM), <http://www.tennessean.com/story/news/2014/02/05/state-sets-execution-dates-for-10-men/5233335>. Three of the ten executions were scheduled for 2014 and the remaining seven for 2015, *see id.*, but as of this writing, none of them had actually occurred, *see Execution List 2014*, *supra* note 87 (listing no Tennessee executions); *Execution List 2015*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/execution-list-2015> (last visited Feb. 15, 2015) (same).

90. See Graham Lee Brewer, *Oklahoma Set for Possible Double Execution*, OKLAHOMAN (Apr. 24, 2014, 9:35 PM), <http://newsok.com/oklahoma-set-for-possible-double-execution/article/4516534>. The challenges had been based on Oklahoma's concealment of the source of the drugs, a policy that the state supreme court upheld after much legal wrangling. *Id.* The first execution ended up going horribly wrong, causing the second to be delayed. *See infra* notes 252–53 and accompanying text (discussing botched Oklahoma execution).

For example, when Ohio used the new combination of midazolam and hydromorphone in 2014, the execution took twice as long as usual, with the prisoner gasping and convulsing as he died.<sup>91</sup> Similarly gruesome reports followed lethal injections with untried protocols in Florida, Oklahoma, South Dakota, and Arizona.<sup>92</sup>

The phenomenon of botched executions as a second-order effect of the moral marketplace is not surprising when one considers that states are experimenting with a dizzying array of new formulas, in both single-drug and multiple-drug combinations.<sup>93</sup> We have already noted the use of thiopental, pentobarbital, propofol, phenobarbital, midazolam hydrochloride, and hydromorphone.<sup>94</sup> Not yet mentioned are lethal injection protocols using lorazepam, vecuronium bromide, rocuronium bromide, and methohexital sodium.<sup>95</sup> It's a veritable alphabet

91. See Dana Ford & Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN (Jan. 17, 2014, 1:01 PM), <http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution>. Ohio's experience caused Louisiana to second-guess an earlier decision to use the same two drugs. See Jeremy Kohler, *Missouri Says It's Ready to Execute Murderer—The Question Is How*, St. LOUIS POST-DISPATCH (Feb. 19, 2014, 12:30 AM), [http://www.stltoday.com/news/local/crime-and-courts/missouri-says-it-s-ready-to-execute-murderer-the-question/article\\_c0e06f54-9e45-502c-a061-2e9c39e76cce.html](http://www.stltoday.com/news/local/crime-and-courts/missouri-says-it-s-ready-to-execute-murderer-the-question/article_c0e06f54-9e45-502c-a061-2e9c39e76cce.html) (reporting Louisiana's decision to delay execution while drugs' effects were studied). In contrast, Arizona was undaunted, announcing plans to switch to the Ohio cocktail, see Kiefer, *supra* note 86, and it too botched an execution, see *infra* notes 258–59 and accompanying text (discussing Arizona's 2014 botched execution lasting two hours).

92. See Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, N.Y. TIMES (Jan. 16, 2014), <http://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html> (describing Oklahoma's use of pentobarbital, vecuronium bromide, and potassium chloride in an execution in which the prisoner's last words were "I feel my whole body burning"); Adam Serwer, *Lethal Drugs Injected 15 Times in Botched Arizona Execution*, MSNBC (Aug. 2, 2014, 2:40 PM), <http://www.msnbc.com/msnbc/lethal-drugs-injected-15-times-botched-arizona-execution> (discussing experimental lethal drug cocktail used in botched Arizona execution); Dustin Volz, *No Drugs, No Executions: Is This the End of the Death Penalty?*, ATLANTIC (Oct. 28, 2013, 11:13 AM), <http://www.theatlantic.com/national/archive/2013/10/no-drugs-no-executions-is-this-the-end-of-the-death-penalty/280916> (describing Florida's use of midazolam hydrochloride and vecuronium bromide in an execution that took twice as long as usual and involved more bodily movement); Steve Young, *Execution: South Dakota Delivers Eric Robert His Death Wish*, ARGUS LEADER (Oct. 16, 2012), <http://archive.argusleader.com/article/20121016/NEWS/310160016/Execution-South-Dakota-delivers-Eric-Robert-his-death-wish> (describing South Dakota's use of pentobarbital in execution in which prisoner gasped and did not close his eyes). South Dakota's pentobarbital came from a compounding pharmacy and was later revealed to have been infected with a fungus. See *infra* note 103 and accompanying text.

93. See *State by State Lethal Injection*, *supra* note 79 (listing various protocols used by states). States already knew that one drug could do the trick; in Oklahoma, several prisoners had died from the initial injection of the anesthetic, before the two drugs that were actually supposed to kill them were administered. The executioners went ahead and injected the other two drugs into the corpse, for what they called "disposal purposes." Dustin Volz, *Oklahoma Injected Lethal Drugs into Its Death-Row Convicts—After They Were Executed*, NAT'L J. (Mar. 18, 2014), <http://www.nationaljournal.com/health-care/oklahoma-injected-lethal-drugs-into-its-death-row-convicts-after-they-were-executed-20140318>.

94. See *supra* Part I.A–B (discussing thiopental scramble and substitute drugs).

95. See *Alabama Changes Execution Drug Combination, Seeks to Set Execution Dates for 9 Death Row Inmates*, AL.COM (Sept. 12, 2014, 4:45 PM), [http://www.al.com/news/index.ssf/2014/09/alabama\\_changes\\_execution\\_drug.html](http://www.al.com/news/index.ssf/2014/09/alabama_changes_execution_drug.html) (discussing Alabama's use of rocuronium bromide in lethal injection); Lindsey Bever, *Oklahoma Court Postpones Executions Because State Can't Get Drugs in Time*, WASH.

soup. Indeed, out of a total of thirty-two states with the death penalty on their books, only seven still clearly adhere to *Baze*'s particular protocol.<sup>96</sup> Even Kentucky, the respondent in *Baze*, has abandoned its three-drug cocktail.<sup>97</sup>

With substitute drugs has come yet another second-order effect of the moral marketplace: a newfound reliance on compounding pharmacies. Ever since the original thiopental scramble, corrections officers had considered getting their drugs from these small, mostly local businesses.<sup>98</sup> Although compounding pharmacies' traditional role was to custom-make medicines for individual patients who could not handle a usual brand (typically because they were allergic to an inactive ingredient),<sup>99</sup> in theory there was no reason that they could not also make drugs for executions. And as more and more supply options closed, more and more states turned theory into practice, using the "Little Pharma" of compounding pharmacies to fill the gap in their supply chain.<sup>100</sup>

The problem was that, unlike Big Pharma, compounding pharmacies were largely unregulated, which meant their drugs were less reliable, which in turn increased the chances that prisoners executed with their drugs would face an

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POST (Mar. 19, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/03/19/oklahoma-court-resets-executions-in-search-of-lethal-injection-drugs> (discussing Oklahoma's use of vecuronium bromide in lethal injection); Ed Pilkington, *British Drug Company Acts to Stop Its Products Being Used in US Executions*, GUARDIAN (May 15, 2013, 1:16 PM), <http://www.theguardian.com/world/2013/may/15/death-penalty-drugs-us-uk> (discussing Arkansas's use of lorazepam in lethal injection); Susie Williams-Allen, *State Believes Drug in Compliance with Statute*, PURCELL REG. (Aug. 26, 2010, 12:00 AM), [http://www.purcellregister.com/news/article\\_b067d92a-2236-5982-9aea-fa2defbb2722.html](http://www.purcellregister.com/news/article_b067d92a-2236-5982-9aea-fa2defbb2722.html) (discussing Oklahoma's proposed use of methohexital sodium in lethal injection). Alabama's decision to try rocuronium bromide actually led to problems for U.S. drug company Mylan Inc.; a German investment firm divested itself of \$70 million of the company's stock after British activists claimed that Mylan was the source of Alabama's rocuronium bromide. See Tracy Connor, *Drug Maker Mylan Takes \$70 Million Hit in Battle over Lethal Injection*, NBC NEWS (Oct. 21, 2014, 10:26 AM), <http://www.nbcnews.com/storyline/lethal-injection/drug-maker-mylan-takes-70-million-hit-battle-over-lethal-n230051>.

96. The seven states are Colorado, Kansas, Nebraska, Nevada, Oregon, Utah, and Wyoming—and several of those have not executed anyone for years, so it is hard to tell exactly what protocol they would use if they resumed. See *State by State Lethal Injection*, *supra* note 79. For example, Pennsylvania's protocol was unclear since it had not executed anyone for fifteen years, until it recently announced that it was looking for pentobarbital. See Christopher Moraff, *Pennsylvania's Lethal Injection Fiasco*, DAILY BEAST (Sept. 18, 2014), <http://www.thedailybeast.com/articles/2014/09/18/pennsylvania-s-lethal-injection-fiasco.html>.

97. Brett Barrouquere, *Ky. Asks Judge to Lift Ban on Executions*, KY. NEW ERA (Mar. 8, 2013, 8:15 PM), [http://www.kentuckynewera.com/web/news/article\\_ee583740-87b7-11e2-b243-001a4bcf887a.html](http://www.kentuckynewera.com/web/news/article_ee583740-87b7-11e2-b243-001a4bcf887a.html).

98. As one of Scott Kernan's colleagues reminded him during their frantic search for thiopental in 2010, "Don't forget the compounding [sic] pharmacies." See E-mail from John McAuliffe, Corr. Counselor, Cal. Dep't of Corr. & Rehab., to Scott Kernan, Undersec'y of Operations, Cal. Dep't of Corr. & Rehab. (Sept. 29, 2010, 15:39 PST), available at [https://www.aclunc.org/sites/default/files/hospital\\_search.pdf](https://www.aclunc.org/sites/default/files/hospital_search.pdf).

99. See Denno, *supra* note 18, at 1367.

100. See Jack Elliott, Jr., *New Lawsuit Challenges Mississippi Execution Drugs*, WASH. TIMES (Mar. 28, 2014), <http://www.washingtontimes.com/news/2014/mar/28/parties-file-new-lawsuit-over-execution-drugs> (noting that six states have either used, or stated their intention to use, compounding pharmacies for lethal injection drugs: South Dakota, Georgia, Pennsylvania, Colorado, Missouri, Texas, and Ohio).

unconstitutionally high risk of pain.<sup>101</sup> It did not help that in October 2012, a compounding pharmacy made the headlines in a deadly incident completely unrelated to capital punishment; it supplied the medical community with a steroid that turned out to be contaminated by fungus, causing the deaths of sixty-four people from meningitis and sickening hundreds more.<sup>102</sup> Less widely reported was that, in the very same month, a different compounding pharmacy sold a different contaminated drug that was involved in a different death: the execution in South Dakota of Eric Robert, who gasped, snorted, and kept his eyes open throughout.<sup>103</sup>

Small wonder that as prisoners and their attorneys realized where states were now getting their drugs, they began to scrutinize these previously unknown businesses. Indeed, the scrutiny of death penalty drug suppliers is itself a second-order effect of the international moral marketplace. No one paid attention to Hospira in all the years that it supplied thiopental to corrections officials. But since the drug shortage drew national attention to the issue, the domestic suppliers of death penalty drugs have occupied center stage.

Compounding pharmacies have not enjoyed the spotlight. Earning a cool \$8,000 (in cash, no less) to prepare a few grams of a simple compound seems like a good idea—until your name is in the headlines and death penalty opponents are holding candlelight vigils outside your front door.<sup>104</sup> One inmate actually sued an Oklahoma compounding pharmacy that had supplied Missouri with pentobarbital, alleging violations of state and federal law.<sup>105</sup> Not surprisingly, that firm has exited the market for lethal injection drugs.<sup>106</sup>

With that kind of publicity, compounding pharmacies began to question whether the game was worth the candlelight. “Supplying drugs to execute

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101. See Denno, *supra* note 18, at 1366–67. The exact constitutional analysis on this point is complicated because the Supreme Court’s *Baze* decision resulted in several opinions, no single one of which carried a majority. See *supra* note 42.

102. See *Multistate Outbreak of Fungal Meningitis and Other Infections—Case Count*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hai/outbreaks/meningitis-map-large.html> (last visited Mar. 31, 2014).

103. See Ed Pilkington, *Georgia Rushes Through Executions Before Lethal Injection Drugs Expire*, GUARDIAN (Feb. 22, 2013, 12:35 AM), <http://www.theguardian.com/world/2013/feb/21/georgia-executions-lethal-injection-drug-pentobarbital> (discussing discovery of fungal infection in South Dakota’s pentobarbital); *South Dakota Covers up Source of ‘DIY’ Death Penalty Drugs Ahead of Execution*, REPRIEVE (Oct. 30, 2012), [http://www.reprive.org.uk/press/2012\\_10\\_30\\_South\\_Dakota\\_execution\\_drugs](http://www.reprive.org.uk/press/2012_10_30_South_Dakota_execution_drugs); Young, *supra* note 92 (describing execution).

104. See *Here & Now: Oklahoma Pharmacy Says No to Providing Execution Drug*, WBUR (Feb. 18, 2014), <http://hereandnow.wbur.org/2014/02/18/oklahoma-execution-drug> [hereinafter *Here & Now*] (discussing vigils outside compounding pharmacy); Bob Priddy, *State Hopes to Execute Michael Taylor*, MISSOURINET (Feb. 25, 2014), <http://www.missourinet.com/2014/02/25/state-hopes-to-execute-michael-taylor-audio> (noting \$8,000 cash paid for lethal injection drug).

105. Complaint, *Taylor v. Apothecary Shoppe, LLC*, No. 14-CV-063 (N.D. Okla. filed Feb. 11, 2014).

106. The case settled, with the Apothecary Shoppe agreeing to provide no more drugs to corrections officials. See Meredith Clark, *Pharmacy Agrees Not to Provide Execution Drugs*, MSNBC (Feb. 18, 2014, 11:16 AM), <http://www.msnbc.com/msnbc/pharmacy-wont-provide-execution-drugs>.

people is officially not a great business advertisement,” observed one commentator.<sup>107</sup> One compounding pharmacy that had been outed actually asked Texas to return its drugs. Like Nebraska, Texas refused.<sup>108</sup> Since then, the International Academy of Compounding Pharmacists has adopted a resolution discouraging its members from providing compounded lethal injection drugs.<sup>109</sup>

This leads to a final second-order effect of Big Pharma’s moral objections to supplying drugs for lethal injection: dramatically increased secrecy on the part of death penalty states. It began with practices at departments of correction, such as confidentiality agreements, payments in cash, redacted records, and transactions carried out in hidden, sometimes out-of-state locations.<sup>110</sup> Then state legislatures got on board, with several enacting laws insulating their drug protocols and sources from public view.<sup>111</sup>

Never before had the executioner’s hood been lowered over the source of death penalty drugs. One can understand why states would want to keep their doings hidden, given their increased reliance on sketchy suppliers and questions from defense counsel and federal regulators about their drugs’ provenance. One can also understand, however, why inmates would insist on knowing the source and quality of the drugs used to execute them, given *Baze*’s holding that the constitutionality of lethal injection depends greatly on the particular drug protocol involved. Unsurprisingly, then, the new secrecy laws generated a slew of litigation in states across the country, causing yet more problems for the orderly administration of capital punishment.<sup>112</sup>

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107. Tim Schildberger, *Death Penalty Debate Comes Down to Drugs*, CANBERRA TIMES (Mar. 9, 2014, 3:00 AM), <http://www.canberratimes.com.au/comment/death-penalty-debate-comes-down-to-drugs-20140308-34e5t.html>.

108. See Jim Salter, *What’s Behind the Growing Shortage of Lethal-Execution Drugs?*, CHRISTIAN SCI. MONITOR (Feb. 18, 2014), <http://www.csmonitor.com/USA/Latest-News-Wires/2014/0218/What-s-behind-the-growing-shortage-of-lethal-execution-drugs>; see also *supra* notes 49–50 and accompanying text (discussing Nebraska’s refusal to return death penalty drugs upon request from manufacturer).

109. See Press Release, Int’l Acad. of Compounding Pharmacists, IACP Adopts Position on Compounding of Lethal Injection Drugs (March 24, 2015), available at <http://www.deathpenaltyinfo.org/documents/IACPPressRelease.pdf>. The American Pharmacists Association quickly followed suit. Press Release, Am. Pharmacists Ass’n, APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution (March 30, 2015), available at <http://www.deathpenaltyinfo.org/documents/APhAResolution.pdf>.

110. See *Here & Now*, *supra* note 104. As with so much of this story, these practices began in California; when state officials first tried to find more thiopental, their e-mails read like a spy novel, with teams of agents being instructed to conduct a “secret and important mission.” See, e.g., E-mail from Scott Kernan, Undersec’y of Operations, Cal. Dep’t of Corr. & Rehab., to Anthony Chaus, Assistant Sec’y, Cal. Dep’t of Corr. & Rehab. (Sept. 29, 2010, 04:02 PST), available at [https://www.aclunc.org/sites/default/files/secret\\_mission\\_to\\_arizona.pdf](https://www.aclunc.org/sites/default/files/secret_mission_to_arizona.pdf).

111. See Denno, *supra* note 18, at 1376–78. For example, a compounding pharmacy that supplied Missouri with pentobarbital operated under a confidentiality agreement with the states and only accepted payments in cash. See *Here & Now*, *supra* note 104.

112. See Denno, *supra* note 18, at 1380–81 (discussing secrecy litigation across a number of states); see also Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367 (2014) (arguing that inmates have a constitutional right to information about their method of execution).

In the aggregate, then, Big Pharma's refusal to sell drugs to corrections officials has both directly inhibited states' ability to carry out executions and indirectly led to second-order effects (speed, secrecy, and substitute drugs and suppliers) that have further disrupted the administration of capital punishment. In short, the advent of the moral marketplace for lethal injection drugs has made a mess of American capital punishment. What we will now see, however, is that the objections of major pharmaceutical companies are driven by more than their own reluctance to be merchants of death. It turns out that this is a decidedly international tale of moral suasion, with state actors, not private industry, taking center stage.

## II. INTERNATIONAL NORMS AND THE MORAL MARKETPLACE

Thus far, we have told the story of how the advent of the moral marketplace has thrown a wrench into the administration of the death penalty in the United States—and that much is true. But as told, the story is incomplete, for behind Big Pharma's reluctance to supply death penalty drugs is a larger, more pervasive force in the marketplace: international anti-death-penalty norms.

In the following discussion, we shine a light on those norms. First we explain how foreign governments, mostly European, have spent decades trying—but failing—to convert the United States to their abolitionist view, using the legal modalities through which the international community traditionally expresses its norms. We then show how the recent shortage of lethal injection drugs is actually the result of a striking paradigm shift away from those legal modalities and toward a market modality instead. Foreign governments (again, mostly European) have exported their anti-death-penalty norms through the marketplace, with pharmaceutical firms as their agents. The use of this new market modality has given foreign norms an unprecedented level of influence over U.S. death penalty practice. Where legal modalities have failed, the market modality has succeeded.

### A. EUROPE'S ABOLITIONIST ACTIVISM AND THE LEGAL MODALITY

Europe's anti-death-penalty stance is hardly new. The continent that suffered through two World Wars under bloodthirsty leaders like Hitler and Mussolini has long taken the stance that “[e]very human being has the inherent right to life.”<sup>113</sup> Most of Western Europe ended the death penalty in the 1960s as part of a worldwide abolition movement.<sup>114</sup> Abolition moved across the continent in

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113. International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 1976 (entered into force Mar. 23, 1976); *see also* American Convention on Human Rights art. 4, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978) (“Every person has the right to have his life respected.”).

114. Indeed, the Supreme Court's temporary abolition of the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), was a part of this movement. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 26–28 (2007) (discussing worldwide abolition movement as part of *Furman*'s larger sociopolitical context).



the following years—Spain in 1978, Luxembourg in 1979, France in 1981, Ireland in 1990, Greece in 1993, and Italy in 1994.<sup>115</sup> By the mid-1990s, the nations of Western Europe had all come to the same place, aligned in their opposition to the state imposition of death.<sup>116</sup> Today this shared view lies at the heart of the law of the European Union; Protocol No. 6 to the European Convention on Human Rights, which a nation must ratify for admission to the E.U., provides for abolition of the death penalty.<sup>117</sup>

As European governments coalesced against the death penalty, they also began promoting an abolitionist stance worldwide. Every member of the E.U. became a signatory to 1991's Second Optional Protocol to the International Covenant on Civil and Political Rights, which states that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights" and binds its signatories to "an international commitment to abolish the death penalty."<sup>118</sup> By the late 1990s, the E.U. had formally embraced worldwide abolition as a core component of its human rights policy, stating in a 1998 declaration that it would "work towards [the] universal abolition of the death penalty as a strongly held policy view agreed by all EU member states."<sup>119</sup>

For present purposes, the key point is not whether Europe pressed for abolition in the United States and elsewhere, but rather how it did so. Unsurprisingly, the governments of Europe expressed their newfound activism using the legal modalities through which sovereign nations traditionally export their norms. These are what Harold Koh calls "law-declaring fora,"<sup>120</sup> and just as he predicts, when the goal is the transmission of international norms into domestic law, legal modalities are the place that European activism has tended to

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115. See *Abolitionist and Retentionist Countries*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Aug. 12, 2014); see also Steiker, *supra* note 3, at 99–100 (discussing worldwide abolition movement of the 1960s and 1970s).

116. Indeed, in all of Europe, only two holdouts remain: Belarus and Kazakhstan—both former Soviet republics that did not become sovereign until the 1990s. See *Abolitionist and Retentionist Countries*, *supra* note 115.

117. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. I, *opened for signature* Apr. 28, 1983, C.E.T.S. No. 114 (entered into force Mar. 1, 1985) ("The death penalty shall be abolished."); Eur. Parl. Ass., *Resolution 1044 (1994): On the Abolition of Capital Punishment*, 25th Sess., Doc. No. 7154 (1994) (making ratification of Protocol No. 6 a prerequisite for membership in E.U. Council of Europe); see also *EU Policy on Death Penalty*, EUROPEAN UNION EXTERNAL ACTION SERVICE, [http://eeas.europa.eu/human\\_rights/adp/index\\_en.htm](http://eeas.europa.eu/human_rights/adp/index_en.htm) (discussing abolition of death penalty as requirement for admission to E.U.); *infra* note 119 (quoting statement from E.U. stating that abolition is an "integral part" of its human rights policy).

118. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, *opened for signature* Dec. 15, 1989, 1642 U.N.T.S. 414 (entered into force July 11, 1991). It was adopted by the General Assembly of the United Nations in 1989. See G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989).

119. Council of the European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (1998), available at <http://www.refworld.org/docid/4705f3d12.html> ("The EU will make these objectives known as an integral part of its human rights policy.").

120. Koh, *Bringing International Law Home*, *supra* note 7, at 626.

focus.<sup>121</sup>

For Europe's anti-death-penalty governments, acting through law-declaring fora meant more protocols, resolutions, declarations, and the like. Protocol No. 13 of the European Convention on Human Rights, which entered into force in 2002, declared that abolition of the death penalty was essential "for the full recognition of the inherent dignity of all human beings."<sup>122</sup> Human Rights Resolution 2005, adopted by the U.N. Commission on Human Rights, called upon nations "[t]o abolish the death penalty completely and, in the meantime, to establish a moratorium on executions."<sup>123</sup> And U.N. Resolution 62/149, adopted by the U.N. General Assembly in 2007, stated that "the death penalty undermines human dignity" and called upon states to establish a moratorium on executions with a view toward abolition.<sup>124</sup> The latter resolution, sponsored in part by the E.U., passed by a vote of 104 nations in favor, 54 against, with the United States rounding out the list of dissenters.<sup>125</sup>

Other law-declaring fora include judicial and executive authorities, and European governments were active in those spheres as well—particularly when it came to opposing capital punishment in the United States. The E.U. filed amicus briefs in high-profile death penalty cases pending before the U.S. Supreme Court.<sup>126</sup> Its nations refused to extradite accused criminals without assurances that they would not be put to death.<sup>127</sup> And its diplomats petitioned

121. See Koh, *Why Do Nations Obey International Law?*, *supra* note 7, at 2602.

122. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, *opened for signature* May 3, 2002, C.E.T.S. No. 187 (entered into force July 1, 2003).

123. Commission on Human Rights Res. 2005/59, *The Question of the Death Penalty*, 61st Sess., Apr. 20, 2005, U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005).

124. Moratorium on the Use of the Death Penalty, G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Dec. 18, 2007). Supporting the resolution were over five million signatures. See *UN Receives Five Million Signatures in Favour of a Moratorium on Executions*, WORLD COALITION AGAINST THE DEATH PENALTY (Nov. 8, 2007), <http://www.worldcoalition.org/UN-receives-five-million-signatures-in-favour-of-a-moratorium-on-executions.html>.

125. See Press Release, Gen. Assembly, General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty, U.N. Press Release GA/10678 (Dec. 18, 2007); see also *Universal Abolition of the Death Penalty*, SCOOP WORLD INDEP. NEWS (Oct. 10, 2008, 4:34 PM), <http://www.scoop.co.nz/stories/WO0810/S00227/universal-abolition-of-death-penalty.htm> (describing the General Assembly's passage of the resolution as "[a] culmination of the EU's efforts").

126. See Brief for the European Union and Members of the International Community as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1619203 (execution of minors); Brief for the European Union as Amicus Curiae Supporting Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8727) (execution of the mentally ill).

127. See Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/RES/45/116 (Dec. 14, 1990) (providing for refusal to extradite "[i]f the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out"); Commission on Human Rights Res. 1999/61, *The Question of the Death Penalty*, 55th Sess., Apr. 28, 1999, U.N. Doc. E/CN.4/RES/1999/61 (Apr. 28, 1999) (advising "States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out"); Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly*

state governors and parole boards to stop impending executions and protested when their pleas went unheeded.<sup>128</sup>

These efforts had two things in common. First, as we have seen, they attempted to effect change through traditional legal modalities—treaties, legislatures, courts, and so forth. European nations did occasionally attempt to apply social pressure as well, encouraging grassroots and NGO movements (such as the World Congress Against the Death Penalty, the World Coalition Against the Death Penalty, and the World Day Against the Death Penalty)<sup>129</sup> and donating money to anti-death-penalty causes.<sup>130</sup> But for the most part, Europe used the traditional instruments of international law to try to change U.S. policy on the death penalty.

Second, these efforts were patently ineffective. Despite the dogged determination of European governments, and millions of dollars spent in pursuit of their goal, the international campaign to end the death penalty had little effect on U.S. practices.<sup>131</sup> Even the International Court of Justice was powerless to delay executions.<sup>132</sup> It was not until European governments switched tactics and

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*Isolation for the U.S.*, DEATH PENALTY INFO. CENTER (Oct. 1999), <http://www.deathpenaltyinfo.org/international-perspectives-death-penalty-costly-isolation-us> (“Countries such as England, France, Canada, Mexico, Italy, the Dominican Republic, and Germany have refused or delayed the extradition of people charged with murder in the U.S. in order to secure assurance from the prosecution that the death penalty will not be sought.”).

128. See Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014, 7:06 PM), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790>.

129. See Evi Girling, *European Identity and the Mission Against the Death Penalty in the United States*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT 112, 116–17 (Austin Sarat & Christian Boulanger eds., 2005) (discussing institution of the first World Congress against the death penalty, which took place in the Council of Europe and European Parliament buildings, and other E.U. inspired measures in wake of World Congress). As Koh has put the point, “Sometimes an international norm is socially internalized long before it is politically or legally internalized.” Koh, *Bringing International Law Home*, *supra* note 7, at 643.

130. See Ford, *supra* note 128 (noting that EU agencies contributed over \$4.8 million to anti-death-penalty organizations in the United States between 2009 and 2013); *Universal Abolition of the Death Penalty*, *supra* note 125 (noting that more than €15 million have been allocated for abolitionist activism). For example, European authorities recently funded a number of American Bar Association state-by-state reports on the administration of the death penalty. See, e.g., AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT (2006) (copyright page reference to European Union); AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT (2013) (copyright page reference to European Initiative for Democracy and Human Rights).

131. Arguably, those international efforts paid off in the Supreme Court’s death penalty jurisprudence, but even that point is highly debatable. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1 (2007) (arguing that international law, like other doctrinal considerations under the Eighth Amendment, only matters when it aligns with where a majority of the Justices already want to go); *infra* notes 173–80 and accompanying text (noting that the Supreme Court has gone back and forth on the propriety of considering international norms in its Eighth Amendment jurisprudence).

132. In 1998 the U.S. Supreme Court and the Commonwealth of Virginia both declined to delay the execution of Angel Breard, even though the International Court of Justice (ICJ) had ordered a stay based on alleged violations of the Vienna Convention on Consular Relations. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 535–38

embraced a new, market-based modality that anything changed. It turned out that the best way for Europe to start exporting its norms was to stop exporting its drugs.

#### B. THE NEW MARKET MODALITY

Europe's success in exporting its anti-death-penalty norms to the United States began in a small town in northern Italy.

As previously discussed, it was Hospira's inability to fill orders for sodium thiopental that set off 2010's mad scramble for the drug in death penalty states.<sup>133</sup> Although Hospira initially blamed the shortage on issues in its supply chain,<sup>134</sup> a second explanation later emerged. In early 2010, an FDA inspection had revealed problems at Hospira's aging facility in North Carolina, where it produced thiopental, and the company decided to move production to a facility in Liscate, Italy.<sup>135</sup> But when the Italian government learned that thiopental would be manufactured in its territory, it refused to license the Liscate plant absent guarantees that the drugs made there would not be used in executions.<sup>136</sup> In addition, there was talk that if Hospira knew that its drug was used for lethal injection in the United States—and it surely did<sup>137</sup>—the company might “have to answer to charges of complicity to murder.”<sup>138</sup>

While the Italians were pressuring Hospira to keep its drugs out of U.S. execution chambers, other ties between European suppliers and American offi-

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(1999). Then-U.S. Secretary of State Madeline Albright appealed directly to Virginia's Governor, stating that to execute Breard in the face of the ICJ's stay order “could be seen as a denial by the United States of the significance of international law.” Dieter, *supra* note 127 (quoting Letter from Madeleine Albright, U.S. Secretary of State, to James Gilmore, Governor of Virginia, April 13, 1998). Indeed, one review showed that the United States complied with the Vienna Convention on Consular Relations in only seven of the more than 160 cases in which death sentences were imposed on foreign nationals. *See id.*

133. *See supra* Part I.A (discussing 2010 thiopental scramble).

134. As previously noted, what Hospira said about its supply chain was true. *See supra* note 19 and accompanying text. It is just that, as we will now see, there was more to the story than Hospira was telling—and the company's ultimate decision to exit the thiopental market was not about raw materials at all.

135. *See* Letter from John R. Gridley, Dir., Atlanta Dist., Food & Drug Admin., to Christopher B. Begley, Chief Exec. Officer, Hospira, Inc., (Apr. 12, 2010), *available at* <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm208691.htm> (detailing problems in North Carolina facility); Declaration of Maya V. Foa, *Beatty v. FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012) (No. 11-289), ECF No. 12 (relaying conversation with Hospira representative about decision to transfer thiopental production to Italy).

136. *See* John Gever, *Lethal Injection Opponents Play Whack-A-Mole*, MEDPAGE TODAY (Apr. 19, 2011), <http://www.medpagetoday.com/PublicHealthPolicy/Ethics/26017>.

137. Thiopental had been used in executions by lethal injection since 1982, and Hospira was the sole domestic supplier. *See supra* notes 16–17 and accompanying text. In addition, correspondence between Hospira and state departments of corrections left no doubt as to the reason they wanted to purchase Hospira's product. *See supra* note 36 (quoting correspondence).

138. *See* Hands Off Cain & Reprieve, *Lethal Trade: How an Abolitionist Country Is Collaborating in Putting People to Death in the United States*, HANDS OFF CAIN (Dec. 2, 2010), <http://www.handsoffcain.info/chisiamo/index.php?idtema=13316650>.

cials were coming to light. Remember that thiopental that Arizona gave to California?<sup>139</sup> It turns out that Arizona had kept some of that supply for itself, and it used it in an execution in October 2010.<sup>140</sup> News reports soon revealed that Arizona's thiopental had originated with the British company Archimedes Pharma.<sup>141</sup> Although Archimedes denied any knowledge of the drug's downstream use,<sup>142</sup> in November the U.K. government responded with export restrictions on all thiopental shipments to the United States.<sup>143</sup> "This move underlines this government's . . . moral opposition to the death penalty in all circumstances without impacting legitimate trade," Great Britain's Business Secretary noted in a statement to the press.<sup>144</sup>

Meanwhile, back in Italy, Hospira finally caved. As discussed above, in January 2011 the company announced that it would exit the thiopental market.<sup>145</sup> Not yet discussed is that Hospira's press release specifically cited pressure from the Italian government as the deciding factor in its decision to exit the thiopental market:

Italy's intent is that we control the product all the way to the ultimate end user to prevent use in capital punishment. . . . [W]e cannot take the risk that we will be held liable by the Italian authorities if the product is diverted for use in capital punishment. Exposing our employees or facilities to liability is not a risk we are prepared to take.<sup>146</sup>

Anti-death-penalty advocates lauded the decision, praising Hospira "for having chosen the most radical and secure solution, in line with the Italian commitment to put a global end to the absurd and archaic practice of the death penalty."<sup>147</sup> (The fact that thiopental was less than 0.25% of Hospira's total sales might have had something to do with its decision too.<sup>148</sup>)

By early 2011, then, two different European governments had begun to work changes in the marketplace for lethal injection drugs. Their initial moves were purely reactive; they were responses to the revelation that thiopental suppliers were doing business (or intending to) on their soil. Indeed, the governments

139. Sure you do. *See supra* note 24 and accompanying text.

140. *See* Owen Bowcott & Chris McGreal, *British Firm Denies Exporting Drug for Arizona Execution*, *GUARDIAN* (Oct. 27, 2010, 4:11 PM), <http://www.theguardian.com/business/2010/oct/27/british-firm-denies-exporting-drug>.

141. *See id.*

142. *See id.* Archimedes's denial was plausible because the thiopental had passed through the hands of a different firm, Dream Pharma, before reaching Arizona. *See supra* note 51 and accompanying text.

143. *See* Dominic Casciani, *US Lethal Injection Drug Faces UK Export Restrictions*, *BBC News* (Nov. 29, 2010, 8:47 AM), <http://www.bbc.com/news/uk-11865881> (reporting that government license will be required for export).

144. *Id.*

145. *See supra* note 33 and accompanying text.

146. Press Release, Hospira, Inc., *supra* note 32.

147. Hands Off Cain & Reprieve, *supra* note 138.

148. *See* Marris, *supra* note 68.

involved did not seem to have appreciated the market forces they were setting into motion.

Yet it did not take long for Europe to realize the market modality's potential. The idea of using the market to further abolitionist goals may have arisen through one-off confrontations with suppliers like Hospira and Archimedes, but it quickly blossomed into a deliberate, comprehensive campaign to use the marketplace to interfere with U.S. capital punishment practices. In April 2011, Germany's human rights commissioner asked for export controls of thiopental in Germany and recommended an E.U. export ban on all lethal injection drugs.<sup>149</sup> Not even a personal plea from the U.S. Secretary of Commerce could shake loose a shipment of thiopental from Germany.<sup>150</sup> That same month, the British expanded their export ban to include the other two drugs in the typical lethal injection cocktail, pancuronium bromide and potassium chloride,<sup>151</sup> and then joined Germany's push to impose similar restrictions across Europe.<sup>152</sup>

By the end of 2011, those calls were heeded: in December, the E.U. imposed export controls on eight drugs that could be used in lethal injection, including thiopental and pentobarbital.<sup>153</sup> Like the earlier British law, the European restrictions did not ban exports entirely; instead, they required prior authorization by national authorities, which would not be forthcoming if there were "reasonable grounds" to believe the drugs would end up in an executioner's hands.<sup>154</sup> Announcing the new restrictions, an E.U. spokesman stated, "I wish to underline that the European Union opposes the death penalty under all circumstances. . . . In this regard, the decision today contributes to the wider EU efforts to abolish the death penalty worldwide."<sup>155</sup> A British member of the European Parliament confirmed the abolitionist sentiment driving the restrictions, stating,

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149. See *Germany Urges EU Export Ban of US Execution Drug*, ROAD2JUSTICE (Apr. 4, 2011), <http://road2justice.wordpress.com/2011/04/04/germany-urges-eu-export-ban-of-us-execution-drug>. Germany's health minister had already written a letter to the country's three producers of thiopental, urging them to ignore shipment requests from the United States. See *id.*

150. See Ford, *supra* note 128. German Economic Minister Philipp Rosler publicly stated, "I noted the request and declined." *Id.*

151. See Department for Business, Innovation & Skills, *Announcement: Government Bans Export of Lethal Injection Drugs to the US*, Gov.UK (Apr. 14, 2011), <https://www.gov.uk/government/news/government-bans-export-of-lethal-injection-drugs-to-the-us>.

152. See *id.*

153. See *Europe's Moral Stand Has U.S. States Running out of Execution Drugs, Complicating Capital Punishment*, CBS News (Feb. 18, 2014, 6:10 AM), <http://www.cbsnews.com/news/europe-moral-stand-us-states-running-out-of-execution-drugs-complicating-capital-punishment> [hereinafter *Europe's Moral Stand*]; Press Release, European Commission, Commission Extends Control over Goods Which Could Be Used for Capital Punishment or Torture (Dec. 20, 2011), available at [http://europa.eu/rapid/press-release\\_IP-11-1578\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1578_en.htm).

154. Press Release, European Commission, *supra* note 153. For the full text of Council Regulation (EC) No. 1236/2005, see <http://www.mi.government.bg/en/library/council-regulation-ec-no-1236-2005-of-27-june-2005-114-c80-m262-1.html>.

155. Press Release, European Commission, *supra* note 153; see also *Europe's Moral Stand*, *supra* note 153 (quoting chairwoman of European Parliament's subcommittee on human rights as stating, "Our political task is to push for an abolition of the death penalty, not facilitate its procedure").

“I am proud to have helped lead the campaign to stop EU-produced medicines being hijacked for such appalling uses, in line with the UK and EU commitment to abolish the death penalty around the world.”<sup>156</sup> A member of the European Parliament added, “By persuading responsible pharmaceutical companies to supervise their distribution chain and by getting controls on exports from Europe tightened, U.S. prisons’ ability to procure their death machine supplies has been thwarted.”<sup>157</sup>

As the foregoing statements make clear, the advent of the moral marketplace was a product of foreign anti-death-penalty norms. European governments were driving this train; the pharmaceutical industry merely climbed on board once it became clear that state actors were serious about using the market to fight capital punishment. Hospira is a perfect example. The company gave lip service to opposing the use of its drugs in lethal injection,<sup>158</sup> but it only got religion once Italy started threatening to shut down its production facility in Liscate.<sup>159</sup>

Indeed, government pressure lurked behind all of the Big Pharma opposition discussed in Part I. Consider the confrontation between the State of Missouri and German manufacturer Fresenius Kabi over using propofol in executions.<sup>160</sup> As it turns out, the E.U. had publicly threatened to add the drug to its list of export controls if any state used it in an execution.<sup>161</sup> Thus, on the line for Fresenius Kabi was not just one execution, but the loss of its considerable U.S.

156. Ford, *supra* note 128.

157. Makiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2013), <http://www.bloomberg.com/bw/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons>.

158. See *supra* notes 34–36 and accompanying text.

159. Activists had long had the idea of using market pressure on drug companies to combat executions. See, e.g., Justine Sharrock, *Undercutting Executions*, MOTHER JONES (Dec. 28, 2001, 3:00 AM), <http://www.motherjones.com/politics/2001/12/undercutting-executions> (“[D]eath penalty opponents are hoping that applying . . . pressure to drug companies will have a . . . far-reaching effect.”). But until Europe’s governments got involved, the companies simply claimed that there was nothing they could do to control downstream uses of their drugs. See, e.g., *States Moving Quickly to Switch Execution Drug*, USA TODAY (Apr. 21, 2011, 3:39 PM), <http://usatoday30.usatoday.com/news/nation/2011-04-21-execution-drug-pentobarbital.htm> (quoting Lundbeck spokesperson as saying, “We don’t control the full supply chain and how it gets into the hands of the end user”); Letter from Ke&S Gioenhout, Vice President for Clinical Research & Dev., Hospira, Inc., to Ohio Dep’t of Rehab. & Corr. (Mar. 31, 2010), available at <http://www.deathpenaltyinfo.org/documents/HospiraMarch2010Statement.pdf> (proclaiming company’s opposition to use of its products in capital punishment but admitting that “your correctional facility is able to acquire most products through a variety of sources without ordering directly from Hospira”).

160. See *supra* notes 73–76 and accompanying text.

161. See Ford, *supra* note 128. The U.K., as opposed to the E.U., actually banned export of the drug within two months of Missouri’s announcement. See Department for Business, Innovation & Skills, *Announcement: New Export Control of Propofol Announced*, Gov.UK (July 11, 2012), <https://www.gov.uk/government/news/new-export-control-of-propofol-announced> (quoting Business Secretary Vince Cable as saying, “This country opposes the death penalty. We are clear that the state should never be complicit in judiciary executions through the use of British drugs in lethal injections.”).

market.<sup>162</sup> Or take Hikma Pharmaceuticals, the British firm that imposed distribution controls on phenobarbital.<sup>163</sup> It appeared to do so on its own, but in reality it took those measures only after its 2013 sale of the drug to Arkansas had been outed—and by that time, it was clear that drugs known to be used in executions quickly became subject to export controls.<sup>164</sup> A similar tale can be told of Lundbeck, the Danish pentobarbital manufacturer, and Sandoz, the Austrian thiopental producer; both grew a moral backbone only after European governments had made it clear that they had to toe the line.<sup>165</sup> Corporate public relations drove what pharmaceutical companies said, but it was European governments that changed what they actually did.

In the end, then, the anti-death-penalty values that infiltrated the U.S. market originated not in the corporate headquarters of Big Pharma, but in the offices of European bureaucrats. Their opposition to the death penalty was nothing new, of course. As discussed above, European governments had long engaged in a campaign to end capital punishment in the United States and elsewhere. What was new was how they conveyed their views: a market modality for a moral norm. The massive direct and indirect effects of the lethal injection drug shortage—untested protocols, botched executions, speed, secrecy, and so on—began with Europe’s use of the market to convey its abolitionist norms. After decades of acting through traditional legal modalities (Koh’s “law-declaring fora”) with no appreciable effect, Europe had finally turned to the marketplace to export its humanitarian values. And in the space of a few months, it had fundamentally disrupted the administration of capital punishment in the United States.

Two observations merit mention here. First, the market modality had been in place for years, waiting to be employed. Indeed, the great irony was that the European Union had already forbidden trade in goods used in capital punishment back in 2005.<sup>166</sup> But that ban included only gallows, guillotines, gas

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162. See Salter, *supra* note 74. The company accordingly raised the specter of such a ban in its appeal to the health care community, which subsequently rallied to its cause. See *supra* notes 76–77 and accompanying text.

163. See *supra* note 80 and accompanying text.

164. See Hikma, *supra* note 80. By the time Hikma’s sale of phenobarbital was revealed, European governments had imposed restrictions on thiopental, pancuronium bromide, potassium chloride, and pentobarbital—and had threatened to do the same for propofol until Missouri backed down from using it. See *supra* notes 143–53 and accompanying text.

165. Lundbeck initially claimed that little could be done to control the downstream distribution of its pentobarbital, see Greg Bluestein, *Replacement Execution Drug Ample, but Has Issues*, WASH. POST (Mar. 2, 2011, 3:45 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030204606.html>, and it only imposed its restrictions a few months before the E.U. itself imposed export controls, see *Death Penalty Opposition: EU Set to Ban Export of Drug Used in US Executions*, SPIEGEL ONLINE INT’L (Dec. 12, 2011, 5:23 PM), <http://www.spiegel.de/international/europe/death-penalty-opposition-eu-set-to-ban-export-of-drug-used-in-us-executions-a-803238.html>. Sandoz agreed not to ship to the United States only after the Austrian government appealed to it publicly. See Raymond Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, N.Y. TIMES (Mar. 30, 2011), <http://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html>.

166. See Council Regulation 1236/2005, 205 O.J. (L 200) 1, 2 (EC).



chambers, and the like; the closest it came to lethal injection was banning the export of the “automatic drug injection systems” used to carry it out.<sup>167</sup> Forbidding export of the lethal injection drugs themselves clearly had not entered the drafters’ minds—that is, not until 2011, when the thiopental scramble brought the issue to the surface and the ban was finally amended to include them. The remarkable thing, therefore, was not that a market modality was used, but that it was there all along, lying dormant until events conspired to make it a particularly opportune tool for conveying Europe’s norms.

Second, Europe’s switch from law-declaring fora to express its abolitionist norms to the market modality adds an interesting twist to the transnational legal process that Koh has long theorized. Koh views this process as having a horizontal component (the process by which one sovereign conveys norms to another) and a vertical component (the process by which a sovereign domesticates, or internalizes, the norms of another).<sup>168</sup> But whereas Koh focuses on the variety of actors that can make this process happen, Lessig focuses on the modalities that are at these actors’ disposal; nation-states can convey norms not only directly, through legal modalities like treaties, but also indirectly, through market regulation.<sup>169</sup> In the death penalty context, we see both theoretical constructs at work: Koh’s transnational actors are still active, but Lessig’s alternative regulatory modalities are being used both to convey the norm and to internalize it. The players have not changed, but the game has. Koh, meet Lessig. Lessig, meet Koh.

That said, recognizing international norms as the driving force behind the moral marketplace does more than allow us to connect and extend the analytical reach of two paradigms of intellectual thought. As we will now see, it also has implications for constitutional debates, the domestic death penalty discourse, and the legal battles that rage around executions. In the long run, this seemingly simple drug shortage is poised to do what decades of abolitionist activism have not—threaten the long-term stability and future of capital punishment itself.

### III. THREE LESSONS

We now know that the scramble for death penalty drugs is largely a product of the moral marketplace. We also know that the moral marketplace is largely a product of moral disapprobation among countries that oppose the death penalty, impeding its use by cutting off the supply of death penalty drugs. In the final Part of this Article, we turn to the implications of our analysis, offering three lessons about the influence of international abolitionist norms—one jurisprudential, one cultural, and one doctrinal.

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167. *Id.*

168. See Koh, *supra* note 1, at 1408–11 (describing the horizontal and vertical components).

169. Lessig, *supra* note 9, at 507.

## A. INTERNATIONAL NORMS IN CONSTITUTIONAL JURISPRUDENCE

The last decade has seen the emergence of a high-profile debate over whether judges can and should rely on international norms in the interpretation of domestic law.<sup>170</sup> Nowhere has this debate been more heated than in constitutional jurisprudence, and within that jurisprudence, nowhere is the controversy more controversial than in the death penalty context—perhaps the starkest example of American exceptionalism in all of constitutional law.<sup>171</sup> In this section, we lay out that debate, then show how the advent of the moral marketplace has turned it into a largely academic sideshow in the context of capital punishment.

## 1. The Jurisprudential Debate over the Influence of International Norms

Although contentious today, the Supreme Court's reliance on international norms in the death penalty context is actually nothing new. The Justices have been relying on international norms in their Eighth Amendment jurisprudence for over a hundred years,<sup>172</sup> and arguing about whether it is appropriate to do so for at least twenty-five. In 1988, a majority of the Justices relied on the position of "nations that share our Anglo-American heritage" in holding that the death penalty for a fifteen-year-old violated the Eighth Amendment.<sup>173</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice White, wrote in dissent, "[T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."<sup>174</sup>

The following year, Justice Scalia's view carried the day. In the 1989 case of *Stanford v. Kentucky*, a majority of the Justices held that the death penalty for sixteen- and seventeen-year-olds did not violate the Eighth Amendment.<sup>175</sup> Writing for the majority, Justice Scalia stated, "We emphasize that it is *Ameri-*

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170. That debate continues today. See, e.g., Ryan C. Black et al., *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine*, 103 GEO. L.J. 1 (2014); Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014). Indeed, it has moved beyond Supreme Court jurisprudence to the jurisprudence of state courts. See, e.g., Michael Kirkland, *Under the U.S. Supreme Court: Islamic Law in U.S. Courts*, UNITED PRESS INT'L (May 19, 2013, 3:30 AM), [http://www.upi.com/Top\\_News/US/2013/05/19/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/64481368948600](http://www.upi.com/Top_News/US/2013/05/19/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/64481368948600) (discussing movement at state level to forbid courts from considering foreign law).

171. See Steiker, *supra* note 3.

172. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977) (noting the practices of other countries in holding that the death penalty for rape is unconstitutional under the Eighth Amendment); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (noting the practices of other countries in holding that the punishment of denationalization for the crime of wartime desertion is unconstitutional under the Eighth Amendment); *Weems v. United States*, 217 U.S. 349, 380–81 (1910) (noting the practices of other countries in holding that the punishment of *cadena temporal*—hard labor while chained at the ankles and wrists—for the crime of forgery of a public document is unconstitutional under the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (noting the practices of other countries in holding that the punishment of death by shooting is constitutional under the Eighth Amendment).

173. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

174. *Id.* at 868 n.4 (Scalia, J., dissenting).

175. 492 U.S. 361, 380 (1989).

*can* conceptions of decency that are dispositive, rejecting the contention of petitioners . . . that the sentencing practices of other countries are relevant.”<sup>176</sup> That left the dissenters pointing to the longstanding use of international norms in Eighth Amendment jurisprudence, and the world community’s overwhelming disapproval of the death penalty for juvenile offenders.<sup>177</sup>

A decade later, the pendulum swung back. In 2002’s *Atkins v. Virginia*, a majority of the Justices relied on international norms in holding that the execution of “mentally retarded” offenders (now known as “intellectually disabled”)<sup>178</sup> violated the Eighth Amendment, with another dissent from Justice Scalia.<sup>179</sup> And in 2005, the controversy went full tilt when the Supreme Court overturned *Stanford* in *Roper v. Simmons*, relying on international norms in holding that the death penalty for juveniles did in fact violate the Eighth Amendment.<sup>180</sup>

Adding fuel to the fire, the majority in *Roper* spent considerably more time discussing international norms than it had in *Atkins*,<sup>181</sup> prompting an especially acerbic Scalia dissent. Accusing the majority of deciding the case based on “the subjective views of five Members of this Court and like-minded foreigners,”<sup>182</sup> Justice Scalia claimed that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand”<sup>183</sup> and lamented that “the views of our own citizens are essentially irrelevant to the Court’s decision today” while “the views of other

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176. *Id.* at 369 n.1.

177. *See id.* at 389–90 (Brennan, J., dissenting) (stating that “[o]ur cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis” and discussing other nations’ positions on the juvenile death penalty, three human rights treaties, and the actual execution of juvenile offenders in only four other countries outside the United States).

178. *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31–87 (5th ed. 2013); *see also* Bret S. Stetka & Christoph U. Correll, *A Guide to the DSM-5*, MEDSCAPE (May 21, 2013), [http://www.medscape.com/viewarticle/803884\\_3](http://www.medscape.com/viewarticle/803884_3) (“In DSM-5, ‘mental retardation’ has a new name: ‘intellectual disability (intellectual developmental disorder),’ the first section in the neurodevelopmental disorders chapter. The change is due to a gradual call for destigmatization among clinicians, the public, and advocacy groups.”).

179. 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *id.* at 347–48 (Scalia, J., dissenting) (“But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . members of the so-called ‘world community[.]’ . . . [I]rrelevant are the practices of the ‘word community,’ whose notions of justice are (thankfully) not always those of our people.”).

180. 543 U.S. 551, 575–78 (2005). For a discussion of *Roper* and *Atkins* as the result of one or both of the Supreme Court’s swing voters—Justices Kennedy and O’Connor—switching sides, *see* Lain, *supra* note 131, at 29–34 (discussing, and discounting, changes in doctrine and the Court’s membership as other possibilities).

181. *See Roper*, 543 U.S. at 575–78; *see also* Volokh, *supra* note 170, at 220–21 (comparing the discussion of foreign norms in *Roper* to *Atkins*).

182. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

183. *Id.* at 624.

countries and the so-called international community take center stage.”<sup>184</sup>

By the time *Roper* was decided, two Justices—Scalia and Breyer—had already engaged in a public debate over the propriety of considering international norms in constitutional cases at an open forum at American University,<sup>185</sup> and several other Justices had already made public remarks about their positions on the issue as well.<sup>186</sup> Between *Atkins* in 2002 and *Roper* in 2005, the Court had decided *Lawrence v. Texas*, relying on international norms in holding that a ban on private, consensual sex violated due process.<sup>187</sup> Thus, the debate over the influence of international norms in constitutional law was already heating up when *Roper* was handed down.

For the political right, *Roper* was the straw that broke the camel’s back, and in the public discourse more broadly *Roper* came to symbolize the greater constitutional controversy.<sup>188</sup> Conservative commentators blasted

184. *Id.* at 622; *see also id.* at 627 (“The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”); *id.* at 628 (“What these foreign sources ‘affirm,’ rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.”).

185. *See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer*, AM. U. WASH. C. L. (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediareel.nsf/O/1F2F7DC4757FD01E85256F890068E6E0>.

186. Justice O’Connor condoned the consideration of foreign norms in a 2004 speech at Georgetown University Law Center, *see* Sandra Day O’Connor, Assoc. Justice, U.S. Supreme Court, Address at the Georgetown University Law Center Ceremony to Formally Open the New Eric E. Hotung International Law Building (Oct. 27, 2004); Patrick Sheridan, *O’Connor Formally Opens New Law Building*, THE HOYA, Oct. 29, 2004, <http://www.thehoya.com/oconnor-formally-opens-new-law-building>, while Justice Ginsburg took the same position during a 2003 American Constitutional Society address, *see* Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Remarks for the American Constitution Society: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003), *available at* <http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf>. Chief Justice Rehnquist took public positions both ways. He cited foreign law while authoring the Court’s opinion in *Washington v. Glucksburg*, 521 U.S. 702, 734 (1997) and approved of the practice in a 1989 address. *See* William H. Rehnquist, Chief Justice, U.S. Supreme Court, Address Before the German–American Conference Sponsored by the Dräger Foundation and the American Institute for Contemporary Studies: Constitutional Courts—Comparative Remarks (Oct. 1989), *in* 14 GERMANY AND ITS BASIC LAW 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (“[I]t is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”). But he joined Justice Scalia’s dissent in *Atkins*, and indeed, wrote separately to emphasize the impropriety of considering international norms in that ruling. *See Atkins v. Virginia*, 536 U.S. 304, 337 (Scalia, J., dissenting); *id.* at 322 (Rehnquist, C.J., dissenting) (“I agree with Justice Scalia . . . I write separately, however, to call attention to the defects in the Court’s decision to place weight on foreign laws . . . The Court’s suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism . . .”).

187. 539 U.S. 558, 576–77 (2003).

188. The title of perhaps the most thorough historical analysis of the issue illustrates the point. *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); *see also* William W. Wilkins, Address, *The Legal, Political, and Social Implications of the*

it.<sup>189</sup> The blogosphere debated it.<sup>190</sup> Academics theorized about it.<sup>191</sup> Confirmation hearings probed it.<sup>192</sup> And the Senate proposed a resolution based on it.<sup>193</sup> Indeed, the Senate also proposed legislation that would have made reliance on foreign law in federal courts an impeachable offense, taking seriously a claim from the year before that Justices who relied on foreign law were “no longer engaging in ‘good behavior’” under the Constitution.<sup>194</sup>

Upon reflection, it should come as no surprise that the fight over the propriety of considering international norms in domestic law has played out largely on the field of the Eighth Amendment. Nowhere does the state exercise more power than when it executes one of its own citizens. And the positive law presents a limit beyond which the state may not go. When the Eighth Amendment forbids a state to execute juveniles or the intellectually disabled, it matters. Consider the fact that between 1989, when *Stanford* said states could execute juveniles, and 2005, when *Roper* said they could not, nineteen juvenile offenders were executed.<sup>195</sup> The positive law’s limits on state power, and by extension the values that inform those limits, have consequences.

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*Death Penalty*, 41 U. RICH. L. REV. 793, 800 (2007) (“The decision in *Roper*, particularly the Court’s reliance on foreign law, has evoked a firestorm.”).

189. See, e.g., Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*; WASH. POST (Apr. 9, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html> (quoting one conservative critic as saying Justice Kennedy “upholds Marxist, Leninist, satanic principles drawn from foreign law”); George F. Will, *Wrong on All Counts*, WASH. POST (Mar. 6, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A8745-2005Mar4.html> (describing the majority opinion in *Roper* as “an intellectual train wreck, but useful as a timely warning about what happens when judicial offices are filled with injudicious people”).

190. See Calabresi & Zimdahl, *supra* note 188, at 752 (discussing and citing various interactive websites).

191. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

192. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. 199–200, 292–93 (2005) (responding to questions from Senators Kyl and Coburn).

193. See S. Res. 92, 109th Cong. (2005) (“Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”); see also H.R. Res. 568, 108th Cong. (2004) (expressing disapproval of consideration of foreign law in all cases involving the laws of the United States).

194. See Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, NBC NEWS (Mar. 11, 2004, 12:35 PM), [http://www.nbcnews.com/id/4506232/ns/politics-tom\\_curry/t/flap-over-foreign-matter-supreme-court](http://www.nbcnews.com/id/4506232/ns/politics-tom_curry/t/flap-over-foreign-matter-supreme-court) (quoting Congressman Tom Feeney commenting on the impropriety of considering foreign law in constitutional adjudication in 2004); Constitution Restoration Act of 2005, S. 520, 109th Cong. §§ 201, 302 (2005) (proposing that it be an impeachable offense for a federal judge to place any reliance on foreign law); see also Milbank, *supra* note 189 (discussing calls for impeachment of Justice Kennedy in the wake of *Roper* decision).

195. See VICTOR L. STREIB, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES*, JANUARY 1, 1973–FEBRUARY 28, 2005 4 (2005).

As such, the positive law is the place one would expect norms constraining state power to reside. This is even more true in the Eighth Amendment context, which is at its core about “nothing less than the dignity of man.”<sup>196</sup> Decisions about whom the state may execute are bound by the moral code enshrined in the Eighth Amendment’s prohibition against “cruel and unusual punishments.”<sup>197</sup> Thus, it makes sense for international norms to influence the practice of capital punishment—if at all—through the positive law. As the Supreme Court has recently explained, “the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency” matters because basic principles of decency are what the Eighth Amendment is all about.<sup>198</sup> If foreigners wish to send their capital punishment norms to our shores, the Eighth Amendment is their port of entry.<sup>199</sup>

In the end, then, the positive law has been the locus of the debate over international norms—regardless of whether one agreed with Justice Breyer or Justice Scalia, and regardless of whether international law actually moved the Supreme Court (rather than simply providing additional support for a preordained result).<sup>200</sup> With the advent of the moral marketplace, however, that is no longer true. The Eighth Amendment is one port of entry, but foreign norms have crossed our borders through other means as well. Indeed, as the next section shows, the influence of international abolitionist norms has shifted away from the positive law to the moral-regulating modality of the market instead.

## 2. The Influence of International Norms Through the Market Instead

To see how the influence of international abolitionist norms has moved from the law to the market modality, consider 2008’s *Baze v. Rees*, which affirmed Kentucky’s three-drug lethal injection protocol.<sup>201</sup> The positive law gave the green light to execute.

In the wake of *Baze*, then, one would have expected a substantial uptick in the number of executions nationally. While *Baze* was pending, the Supreme Court had granted numerous stays of execution, sending executions to their

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196. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). This is why the contours of Eighth Amendment protection are determined in large part by “the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101.

197. U.S. CONST. amend. VIII.

198. See *Graham v. Florida*, 560 U.S. 48, 82 (2010); see also Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER (Sept. 12, 2005), <http://www.newyorker.com/magazine/2005/09/12/swing-shift> (quoting Justice Kennedy as referring to “some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of . . . human dignity” as the connection between Americans and world opinion).

199. Whether Justice Scalia will let them through immigration is another matter.

200. See Lain, *supra* note 131, at 33 (noting that “[t]he global community had strongly opposed the juvenile death penalty in 1989 too,” and the Supreme Court disregarded that view, suggesting that it was not international opinion, but rather the Justices’ changed policy preferences that drove the decision making in *Roper*).

201. 553 U.S. 35, 41 (2008).

lowest levels in over a decade—forty-two in 2007 and thirty-seven in 2008.<sup>202</sup> With *Baze* upholding the predominant lethal injection protocol, and the Justices lifting those stays, one would have thought that executions would surge back to their pre-*Baze* levels of between fifty-three and sixty-five annually.<sup>203</sup>

But that did not happen. After a brief uptick of fifty-two executions in 2009, the years 2010–2014 have seen the number of executions drift back to the levels we saw while *Baze* was pending—forty-six in 2010, forty-three in 2011 and 2012, thirty-nine in 2013, and thirty-five in 2014.<sup>204</sup> Why?

Why have executions, poised for a post-*Baze* comeback, instead resumed their downward decline? In a word, drugs. In three words, lack of drugs. As discussed below, a number of factors have contributed to a long-term decline in death sentences,<sup>205</sup> but over the last several years the dearth of death penalty drugs has been the primary cause of the drop in executions themselves. The shortage of death penalty drugs has posed numerous practical problems for executioners, and states' coping mechanisms—speed, substitutes, and secrecy—have simply created more legal challenges, more grist for the defense mill to grind executions to a halt.

And what has caused the drug shortage? By and large, international anti-death-penalty norms. While the Supreme Court has given death penalty states the go-ahead for lethal injections, the moral objections of other countries have directly, and indirectly, put the brakes on what death penalty states can actually do. The positive law is no longer the primary modality for foreign norms to act as a constraint on states' behavior. The market has taken its place.

As a practical matter, this development is quickly turning the high-profile debate over whether international norms should play a part in interpreting Eighth Amendment law into an academic sideshow. While Supreme Court Justices and legal scholars hotly debate the influence of international norms in death penalty jurisprudence, those norms are exerting influence through other means. Suppose that tomorrow we returned to the isolationist jurisprudence of *Stanford*, once more ignoring international opinion in Eighth Amendment cases. International norms would still exert their influence on the administration of capital punishment where the rubber hits the road: executions.

Indeed, from an international perspective, the market has been a much more effective conveyor of norms than the positive law. As we have already seen, the European community has been working toward a worldwide moratorium on

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202. See *Executions by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited Jan. 31, 2015). The last time executions were in the forties was 1996, which had forty-five. The last time executions were in the thirties was 1994, which had thirty-one.

203. The year 2003 had sixty-five executions, 2004 had fifty-nine, 2005 had sixty, and 2006 had fifty-three. See *id.*; see also Denno, *supra* note 18, at 1344–45 (discussing lethal injection litigation in 2006 as resulting in lower executions that year, and stays of execution while *Baze* was pending in 2007 and 2008).

204. See *Executions by Year*, *supra* note 202.

205. See *infra* notes 209–21 and accompanying text.

executions for decades, and its newfound refusal to supply death penalty drugs has done more to accomplish that objective in the United States than all of its other efforts combined.<sup>206</sup> Moreover, as we will now see, foreign norms transmitted through the moral marketplace are increasingly finding their way into another behavior-regulating modality—culture—influencing not only the supply of death penalty drugs, but also the domestic discourse relating to capital punishment.

#### B. INTERNATIONAL NORMS IN AMERICAN CULTURE

Punishment is a uniquely cultural phenomenon, and that is no less true when the punishment is death.<sup>207</sup> As such, the death penalty is often defended in fiercely domestic terms. Each nation has its own culture of punishment, so the argument goes, and thus the death penalty (like other punishments) is a matter for each nation to decide for itself, unfettered by the decisions other nations might make.<sup>208</sup> The domestic defense of the death penalty is the international version of states' rights: punishment is a matter purely within the purview of the society in which it is practiced, so foreigners should keep their views to themselves. Outsiders, butt out.

But that is not what is happening. Instead, international abolitionist norms expressed through the moral marketplace have seeped into the zeitgeist, impacting the cultural construct of the death penalty in America in several ways. This section details that phenomenon, starting with the status of the death penalty before the advent of the moral marketplace. It then discusses three ways that international norms transmitted through the moral marketplace have impacted the cultural conception of the death penalty in the United States by ending

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206. See *supra* Part II; Mohamed, *supra* note 1 (noting that the de facto moratorium created by the shortage of death penalty drugs was a step towards the E.U.'s goal). Even the E.U.'s influence in *Roper* and *Atkins*, to the extent it was more than just piling on, was of limited impact. By the time the Supreme Court decided *Atkins* and *Roper*, the death penalty for mentally retarded (now "intellectually disabled") offenders and juveniles was already dying out on its own. See Lain, *supra* note 131, at 52 (noting that there were just two juvenile death sentences per year in the two years preceding *Roper*, and that even Virginia was in the process of eliminating the death penalty for mentally retarded offenders when the Supreme Court granted certiorari in *Atkins*).

207. Nowhere is culture's influence in the law more apparent, or more important, than in how we punish. See generally David Garland, *Punishment and Culture: The Symbolic Dimensions of Criminal Justice*, in 11 *STUDIES IN LAW, POLITICS, AND SOCIETY* 191 (Austin Sarat & Susan S. Sibley eds., 1991). For an excellent exploration of the role of culture in capital punishment, see *THE CULTURAL LIVES OF CAPITAL PUNISHMENT* (Austin Sarat & Christian Boulanger eds., 2005).

208. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) ("I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment."); *Europe's Moral Stand*, *supra* note 153 (noting Missouri's Governor's stance that "state and federal court systems, not European politicians, should decide death penalty policy"); Press Release, Gen. Assembly, *supra* note 125 (quoting representative of Barbados as saying, "Capital punishment remains legal under international law and Barbados wishes to exercise its sovereign right to use it . . ."); *id.* (stating that the representative of Singapore at the U.N. argued that "[e]ach State had a sovereign right to choose its own political, criminal and judicial systems" and that "Singapore would continue to follow its own course in the matter").



American isolationism on the death penalty; by ushering a human rights critique into the mainstream death penalty discourse; and by drawing newfound public attention to the death penalty and its many perceived failings.

### 1. America's Death Penalty Before the Moral Marketplace

Even before the advent of the moral marketplace, the death penalty in the United States was in a precarious state. As previously noted, a long list of problems has beset the death penalty over the past several decades, with wrongful convictions (153 so far),<sup>209</sup> grossly inadequate counsel,<sup>210</sup> geographic arbitrariness,<sup>211</sup> and racial discrimination<sup>212</sup> topping the list. The Supreme Court's attempts to ameliorate the most troublesome of the death penalty's shortcomings have in some respects only made matters worse. Wrongful convictions remain,<sup>213</sup> but as Carol and Jordan Steiker have discussed in detail, the Court's extensive regulation of the death penalty has made its administration exceedingly cumbersome and slow, adding dysfunction, uncertainty, and exorbitant cost to the list.<sup>214</sup>

These developments, in turn, have had an appreciable effect on support for, and use of, the death penalty in the United States. In 1988, when *Stanford* was pending,<sup>215</sup> public support for the death penalty was at a historic high of 79%.<sup>216</sup> In 2000, after a spate of high-profile death row exonerations, public support for the death penalty was at a nineteen-year low of 66%, and hovered

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209. See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited May 6, 2015). To be considered "wrongfully convicted," an inmate must be "a. acquitted of all charges related to the crime that placed them on death row, or b. [h]ad all charges related to the crime that placed them on death row dismissed by the prosecution, or c. [b]een granted a complete pardon based on evidence of innocence." *Id.* (emphasis omitted).

210. For a classic discussion of the problem, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

211. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 279 (2012).

212. See, e.g., Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 573 (2014).

213. See, e.g., Mary Kuhlman, *Free at Last: DNA Exonerates 2 NC Men Imprisoned for 30 Years*, CHARLOTTE POST (Sept. 3, 2014, 5:32 AM), <http://www.thecharlottepost.com/news/2014/09/03/local/free-at-last-dna-exonerates-2-nc-men-imprisoned-for-30-years> (discussing DNA exoneration of two North Carolina men accused of raping and murdering an 11-year-old girl); Editorial Board, *The Innocent on Death Row*, N.Y. TIMES (Sept. 3, 2014), <http://www.nytimes.com/2014/09/04/opinion/the-innocent-on-death-row.html> (discussing same and noting that Justice Scalia had used one of these men as an example of the appropriateness of capital punishment, stating, "How enviable a quiet death by lethal injection compared with that!").

214. See Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 L. & INEQ. 213, 223 (2012).

215. *Stanford v. Kentucky*, 492 U.S. 361 (1989), is discussed at *supra* notes 175–77 and accompanying text.

216. See *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Jan. 31, 2015).

between 64%–70% through 2010.<sup>217</sup>

Shaken public confidence in the death penalty, along with skyrocketing costs and states' adoption of life without the possibility of parole (LWOP) as a sentencing alternative, has in turn led to a precipitous decline in death sentences.<sup>218</sup> Juries have grown less interested in returning death sentences, and prosecutors have grown less interested in seeking them.<sup>219</sup> In the mid-1990s, death sentences averaged around 313 per year.<sup>220</sup> A decade later, in the mid-2000s, death sentences averaged around 134 per year, with the yearly total in 2010 being 109—roughly a third of the number handed down fifteen years earlier.<sup>221</sup>

In short, even before the dearth of death penalty drugs, capital punishment in America was in a vulnerable state. Indeed, six states have abandoned the death penalty in the past eight years, a trend we have not seen since the 1960s.<sup>222</sup> And another four have declared a moratorium on executions in response to concerns about the death penalty process.<sup>223</sup> Taken together, these developments paint the picture of a nation deeply ambivalent about the death penalty—and perhaps uniquely susceptible to the cultural influence of international abolitionist norms.

## 2. The End of Isolationism on the Death Penalty

One of the most striking ways that international abolitionist norms have impacted the domestic death penalty discourse is the very fact that they are a part of that discourse. They didn't used to be. Granted, the constitutional controversy over whether to consider foreign norms when interpreting American law brought attention to those norms as a jurisprudential matter, as just discussed.<sup>224</sup> But outside the halls of justice, international opposition to the death penalty has not been a part of mainstream America's conversation about

217. See Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, GALLUP (Feb. 24, 2000), <http://www.gallup.com/poll/3199/support-death-penalty-drops-lowest-level-years-although.aspx>; *Death Penalty*, *supra* note 216.

218. See Steiker & Steiker, *supra* note 214, at 240–41.

219. See *id.* at 240 (“These increased costs, in turn, together with growing public skepticism about the accuracy of the capital system and the near-universal embrace of LWOP as the alternative punishment to death, have radically altered the calculus of prosecutors, who have sought death sentences much less frequently over the past years, sending the absolute number of death sentences to modern-era lows.”).

220. See *Death Sentences by Year: 1976–2012*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009> (last visited Aug. 18, 2014).

221. See *id.*

222. See Jaime Fuller, *How Many States Have Abolished the Death Penalty Since 2000?*, WASH. POST (May 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/14/how-many-states-have-abolished-the-death-penalty-since-2000>. For a discussion of states abolishing the death penalty in the 1960s, see Lain, *supra* note 114, at 22–26.

223. See *Pennsylvania Governor Announces Moratorium on Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/node/6054> (last visited Apr. 3, 2015) (noting announcement of moratorium on executions in Pennsylvania, and moratoriums already declared in Oregon, Washington, and Colorado).

224. See *supra* Part III.A.1 (discussing debate).

capital punishment.<sup>225</sup> It has not been something that Americans talk about, think about, or were even keenly aware of—until now.<sup>226</sup>

Now the shortage of death penalty drugs has brought a slew of attention from the popular press, and the public knows what is gumming up the works: foreign opposition to the imposition of death. Headlines have named European anti-death-penalty sentiment as the source of the shortage,<sup>227</sup> and even where they have not, reports on the shortage of death penalty drugs have tended to talk about its cause as well as its effects.<sup>228</sup> Why have states turned to compounding pharmacies? Why are they trying new combinations of drugs? What is the fight over secrecy laws all about? None of these stories makes sense without some understanding of what upset the status quo in the first place. As one article put the point, “Let’s remember why we are here . . . .”<sup>229</sup> Through the market for death penalty drugs, Europe’s story has become a part of our own.

Maybe it won’t make a difference. Maybe the repeated exposure to Europe’s anti-death-penalty views will have no effect here at home.<sup>230</sup> But then again,

225. See Steiker, *supra* note 3, at 127 (noting the United States’ isolationism and “anti-internationalism” on the death penalty); see also Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 359, 367–421 (2010) (detailing “the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty,” including the central tension between guided discretion and individualized sentencing, race discrimination, evidence of actual innocence on death row, inadequacy of capital defense and other resources in capital cases, politicization of capital punishment, jury confusion, adequate provision for the enforcement of federal rights on habeas review, and the death penalty’s extremely punitive impact on the criminal justice system more broadly, without mentioning American exceptionalism or international opposition to the death penalty more broadly).

226. See Steiker, *supra* note 3; see also Int’l Comm’n of Jurists, *supra* note 4, at 188 (remarking upon “a general lack of awareness” in the United States of its international obligations regarding the death penalty).

227. See, e.g., *Europe’s Moral Stand*, *supra* note 153; Matthew Fleischer, *How Europe Factors into the Drop in American Executions*, TAKEPART (Jan. 6, 2014), <http://www.takepart.com/article/2014/01/06/american-capital-punishment-all-out-drugs>; Sylvie Kauffmann, Op-Ed., *U.S. Execution, European Abolition*, N.Y. TIMES (Nov. 3, 2014), <http://www.nytimes.com/2014/11/04/opinion/sylvie-kauffman-us-execution-european-abolition.html>; Kitamura & Narayan, *supra* note 157; David Osborne, *How the EU Is Thwarting States from Continuing with Capital Punishment*, INDEPENDENT (Nov. 13, 2013), <http://www.independent.co.uk/voices/comment/how-the-eu-is-thwarting-states-from-continuing-with-capital-punishment-8937635.html>; Jill VanderZiel, *Lethal Injection Debacle & European Union Strong-Arming*, LEGAL SOLUTIONS BLOG (May 13, 2014), <http://blog.legalsolutions.thomsonreuters.com/legal-research/lethal-injection-debacle-european-union-strong-arming>.

228. See, e.g., Clare Algar, *Can Big Pharma End the Death Penalty in the US?*, NEW STATESMAN (Oct. 22, 2013, 10:49 AM), <http://www.newstatesman.com/law/2013/10/could-big-pharma-end-death-penalty>; *Compounding Pharmacies Called on to Make Execution Drugs*, NPR (Feb. 17, 2014, 5:00 AM), <http://www.npr.org/2014/02/17/278389208/compounding-pharmacies-called-on-to-make-execution-drugs> (beginning program with the statement that “[p]harmaceutical companies in Europe are blocking the sale of drugs used for lethal injection in the U.S.”); Natasha Lennard, *States Find Terrifying Ways Around Lethal Injection Shortages*, SALON (Jan. 16, 2014, 2:57 PM), [http://www.salon.com/2014/01/16/states\\_find\\_terrorifying\\_ways\\_around\\_lethal\\_injection\\_shortage](http://www.salon.com/2014/01/16/states_find_terrorifying_ways_around_lethal_injection_shortage).

229. Diann Rust-Tierney, *‘My Whole Body is Burning’: Double Execution in Oklahoma*, HUFFINGTON POST (Apr. 29, 2014, 4:37 PM), [http://www.huffingtonpost.com/diann-rusttierney/my-whole-body-is-burning\\_b\\_5228342.html](http://www.huffingtonpost.com/diann-rusttierney/my-whole-body-is-burning_b_5228342.html).

230. Indeed, the fact that Europe is the source of the execution slowdown might even energize America’s many death penalty enthusiasts and cause a jingoistic backlash.

maybe it will. Regime design scholars in international law (as well as other behavioral scientists) have recognized the importance of “cuing” as a means of changing normative positions.<sup>231</sup> The idea is that counterattitudinal messages prompt listeners to “engage in a high intensity process of cognition, reflection, and argument,” if only to defend their positions.<sup>232</sup> This process of cuing actors to reexamine ensconced practices and positions by exposing them to dissonant positions is thought to be particularly potent when the dissonant position is widely shared.<sup>233</sup> Indeed, this is one of the intended microprocesses at work in conventional human rights instruments,<sup>234</sup> and is what Koh is capturing in his iterative “transnational legal process” too.<sup>235</sup> Treaties and other creations of law-declaring fora send a message. It is just that in the death penalty context, it took the market to get the message through.

Whether or not Americans ultimately change their views, the point remains that our culture of isolationism on the death penalty has changed. Historically, the death penalty has been the epitome of American exceptionalism and isolationism.<sup>236</sup> In the wake of Europe’s death penalty drug boycott, America can take steps to maintain its exceptionalism. It can use substitute drugs. And if it cannot inject inmates to death, it can hang them. Or shoot them. Or electrocute or gas them. America can double-down on death, no matter what the E.U. does.

The same is not true for American isolationism on the death penalty. America can keep executing, but it can no longer insulate itself from European abolitionist norms. It may not be convinced by what the rest of the world has to say, but for the first time, it’s listening—if only because it has to.

### 3. The Advent of a Categorical Abolitionist Critique

Another way in which foreign norms have impacted the cultural conception of capital punishment in the United States is by bringing a categorical abolitionist critique into the mainstream death penalty discourse.<sup>237</sup> Until now, the death

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231. See PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 127–67 (1991); Diana C. Mutz et al., *Political Persuasion: The Birth of a Field of Study*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE* 1, 1–17 (Diana C. Mutz et al. eds., 1996); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 637–38 (2004). For behavioral science literature on attitude change more generally, see *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* (James Price Dillard & Michael Pfau eds., 2002).

232. Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT’L STUD. Q. 487, 496 (2001).

233. See James L. Gibson, *A Sober Second Thought: An Experiment in Persuading Russians to Tolerate*, 42 AM. J. POL. SCI. 819, 833–37 (1998); see also Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1187 (1997) (discussing “norm cascades”).

234. See Goodman & Jinks, *supra* note 231, at 636–38.

235. For a discussion of Koh’s transnational legal process, see *supra* notes 7–8 and accompanying text.

236. See *supra* note 225 and accompanying text.

237. This is not to say that a categorical abolitionist critique has been entirely absent, only that it has not been a part of mainstream conversation. For a prominent voice of this critique, see SISTER HELEN PREJEAN: MINISTRY AGAINST THE DEATH PENALTY, <http://www.sisterhelen.org> (last visited Apr. 3, 2015).

penalty debate in the United States has been cast in largely utilitarian terms: the death penalty is not wrong per se, it is just wrong in practice.<sup>238</sup> It is an instrument that plays the right song and just needs a little fine-tuning. Exonerations, racial discrimination, geographical disparities, lack of adequate defense counsel, doubtful deterrence, cost—these are the arguments that have characterized mainstream opposition to the death penalty in the United States.<sup>239</sup> Conspicuously missing from that list is opposition to the death penalty on its own terms—a categorical rejection of the state’s right to intentionally take its citizens’ lives.<sup>240</sup> This is what Carol and Jordan Steiker call the “human rights critique” of the death penalty, and it has been almost entirely absent from the death penalty discourse in the United States.<sup>241</sup>

Why is that so? Carol Steiker surmises that the Supreme Court’s death penalty jurisprudence probably has something to do with it,<sup>242</sup> and we agree. The Court’s validation of the death penalty as a rational means of meeting legitimate penological objectives in the mid-1970s has almost certainly insulated the death penalty from the human rights critique that has proven so powerful in the international arena.<sup>243</sup> As Steiker puts the point, we cannot accept “that our much vaunted constitution could validate something that constitute[s] a violation of international human rights.”<sup>244</sup> So we don’t.

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238. Louis Bilionis provides an explicit and eloquent example of this utilitarian critique:

[R]egardless of what you think of the morality of the death penalty in the abstract, you ought to conclude that our capital punishment system is deeply flawed. The current system sentences innocent people to die for crimes they did not commit. It sentences similarly situated defendants differently, and differently situated defendants the same, for reasons that good people rightly denounce: the color of the accused’s skin; the color of the victim’s skin; the socioeconomic status of the accused or of the victim; poor lawyering that none of us would tolerate in a case that struck closer to home; the vicissitudes of prosecutors, jurors, and judges; and the sheer arbitrariness of good luck and bad.

Louis D. Bilionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601, 606–07 (2000) (footnote omitted).

239. See Steiker & Steiker, *supra* note 214, at 223.

240. As an example, Jordan and Carol Steiker point to the National Coalition to Abolish the Death Penalty’s web-based advocacy, whose centerpiece is “Ten Reasons Why Capital Punishment Is Flawed Public Policy,” noting that even the two reasons that come closest to categorical opposition to the death penalty on moral grounds—that capital punishment goes against almost every religion and that the United States is keeping company with notorious human rights abusers—are still “one step removed from directly asserting the immorality of the death penalty.” *Id.* at 223–24 (emphasis omitted).

241. *Id.* at 223 (discussing the “notable lack of any strong human-rights-based or human-dignity-based critique of the American death penalty in contemporary American discourse”).

242. See Steiker, *supra* note 3, at 129–30.

243. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976). In support of this theory, it is worth noting that the human rights critique of capital punishment was a part of the public discourse in the 1960s and early 1970s. See James Q. Wilson, *The Death Penalty: Is It Useful? Is It Just? Or Is It Only Cruel?* N.Y. TIMES, Oct. 28, 1973, at 27 (discussing major arguments for and against the death penalty).

244. Steiker, *supra* note 3, at 129; see also Steiker & Steiker, *supra* note 214, at 236–37 (noting that “saying that the Constitution does not forbid a practice often confers a special legitimacy” and that the Supreme Court’s validation of the death penalty in *Gregg* “undermin[ed] the broad moral attack on the death penalty”).

But that, too, is starting to change. For almost fifty years, the Supreme Court's validation of the death penalty has insulated the conversation about capital punishment from framing the issue in moral terms. Fifty years ago—even five years ago—the human rights critique was simply not a part of America's mainstream death penalty discourse. Now it is.

Some of that critique has entered the discourse through press coverage of European opposition to the death penalty. Why are Europeans so uptight about the death penalty? Because they oppose state-sponsored killing on moral grounds.<sup>245</sup>

But another development has had an even bigger impact in ushering a human rights critique into the domestic death penalty discourse: executions gone wrong. Botched lethal injections, made more likely by the use of untried combinations of new drugs,<sup>246</sup> are one of the second-order effects of Europe's death penalty drug boycott. And although they are nothing new—botched executions have been occurring for decades<sup>247</sup>—their incidence over the past year has had a massive effect on the cultural conception of capital punishment in the United States.

Botched executions have impacted America's death penalty discourse in part by exposing the violence inherent in extinguishing another life—that is, by putting the human rights critique in our face. Lethal injection had long been considered a more humane, civilized form of execution.<sup>248</sup> Indeed, before the botched executions of 2014, the public viewed lethal injection as peaceful, antiseptic.<sup>249</sup> Like putting down a beloved pet.

Not so today. 2014's four high-profile botched executions have forced the American public to face the violence inherent in lethal injection. “I feel my whole body burning,” were one prisoner's last words, as pentobarbital from an undisclosed source coursed through his veins.<sup>250</sup> Another took almost half an

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245. See, e.g., Jonathan P. Baird, *My Turn: Making the Death Penalty Even More Barbaric*, CONCORD MONITOR (June 3, 2014), <http://www.concordmonitor.com/home/12213622-95/my-turn-making-the-death-penalty-even-more-barbaric> (“No other Western democracy besides the United States resorts to the death penalty, and it is widely considered barbaric in Europe. Only a handful of outlier nations cling to this nasty old practice. Not great when you are in the company of Saudi Arabia, Iran, China, and North Korea.”); *Europe's Moral Stand*, *supra* note 153; Moshik Temkin, Op-Ed., *How to Kill the Death Penalty*, L.A. TIMES (May 26, 2014, 5:00 PM), <http://www.latimes.com/opinion/op-ed/la-oe-temkin-death-penalty-20140527-story.html> (“The issue in France, and later in the European Union, was framed as a moral concern for society as a whole. The death penalty was considered incompatible with the basic principles of human rights.”).

246. See *supra* notes 91–103 and accompanying text.

247. For a fascinating history, see AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (2014). For a discussion of why 2014's botched executions have been more salient than those in previous years, see *infra* notes 265–70 and accompanying text.

248. See *Baze v. Rees*, 553 U.S. 35, 62 (2008) (“The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection.”).

249. Indeed, that was the point. See Greg Mitchell, *How Lethal Injections Became the Go-To Method for Executions in America*, NATION (May 9, 2014, 2:02 PM), <http://www.thenation.com/blog/179777/how-lethal-injections-became-go-method-executions-america>.

250. Bailey Elise McBride, *Oklahoma Death Row Inmates Sue over Drugs' Secrecy*, SOUTHWEST TIMES RECORD (Feb. 26, 2014, 1:58 PM), <http://swtimes.com/news/state-news/oklahoma-death-row-inmates-sue-over-drugs-secrecy>.

hour to die, experiencing what one account described as “repeated cycles of snorting, gurgling and arching his back, appearing to writhe in pain.”<sup>251</sup> Then came Oklahoma’s inadvertent execution of Clayton Lockett, who allegedly died of a heart attack shortly after his botched execution was halted midway through.<sup>252</sup> According to witnesses, Lockett grimaced, grunted, and rolled his head during his execution, mumbling the word “man” and convulsing on the gurney, repeatedly lifting his head and shoulders in an attempt to get up.<sup>253</sup>

Lockett’s execution drew a torrent of criticism, including a rebuke from the White House about the inhumane way the death penalty was carried out in his case.<sup>254</sup> Calls for a moratorium on executions followed,<sup>255</sup> along with commentary on the morality of the death penalty itself. Botched executions not only exposed the inherent brutality of capital punishment, commentators claimed, but also tore down the clinical façade behind which society shields itself from that brutality.<sup>256</sup> “Let’s Stop Pretending the Death Penalty Is a Medical Proce-

251. Welsh-Huggins, *supra* note 82.

252. See Lindsey Bever, *Botched Oklahoma Execution Reignites Death Penalty Debate*, WASH. POST (Apr. 30, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/04/30/botched-oklahoma-execution-reignites-death-penalty-debate>. Lockett died forty-three minutes after the initial lethal injection drugs were administered. See Katie Fretland, *Oklahoma Execution: Clayton Lockett Writhes on Gurney in Botched Procedure*, GUARDIAN (Apr. 30, 2014, 7:58 AM), <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett>. An autopsy later determined that he died not of a heart attack, but rather from lethal injection drugs. See Ed Pilkington, *Clayton Lockett Didn’t Die of Heart Attack, Oklahoma Official Autopsy Shows*, GUARDIAN (Aug. 28, 2014, 5:02 PM), <http://www.theguardian.com/world/2014/aug/28/clayton-lockett-official-autopsy-released>.

253. Fretland, *supra* note 252.

254. See Jerry Markon et al., *White House: Execution Was Not Conducted Humanely*, WASH. POST (Apr. 30, 2014), [http://www.washingtonpost.com/politics/2014/04/30/5a40bd62-d06c-11e3-a6b1-45c4dffb85a6\\_story.html](http://www.washingtonpost.com/politics/2014/04/30/5a40bd62-d06c-11e3-a6b1-45c4dffb85a6_story.html) (quoting White House Press Secretary as stating, “We have a fundamental standard in this country that even when the death penalty is justified, it must be carried out humanely. . . . I think everyone would recognize that this case fell short of that standard.”).

255. See Bever, *supra* note 252; *Oklahoma Legislator Calls for Execution Moratorium*, WASH. TIMES (Apr. 30, 2014), <http://www.washingtontimes.com/news/2014/apr/30/oklahoma-legislator-calls-for-execution-moratorium> (noting “a growing chorus of voices for an execution moratorium following the state’s botched execution of an inmate Tuesday night”).

256. Two months later, Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, would write a widely publicized dissent in an Arizona case, see *infra* text accompanying notes 258–59, that would come to epitomize this view. He wrote:

Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. . . . But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. . . .

. . . [I]f we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.

Wood v. Ryan, 759 F.3d 1076, 1102–03 (2014) (Kozinski, C.J., dissenting from the denial of a rehearing en banc). For a sampling of commentary expressing the same view in the wake of Lockett’s execution, see, e.g., Baird, *supra* note 245; ‘Botching It’ Just Grisliest Argument Against Execution, TENNESSEAN (May 1, 2014, 11:05 PM), <http://www.tennessean.com/story/opinion/editorials/2014/05/02/botching-just-grisliest-argument-execution/8577729>; James Downie, *Oklahoma’s Horrible ‘Botched Execution’ Shows Again Why the Death Penalty Should Be Abolished*, WASH. POST (Apr. 30, 2014),

dure,” read the title of one op-ed, capturing the sentiment nicely.<sup>257</sup>

Just when it seemed the death penalty’s public image could not get worse, it did. In July 2014, Arizona joined the ranks of states to garner national attention for a botched execution. The condemned prisoner took two hours to die, during which time witnesses described him as gasping for breath “like a fish on shore gulping for air.”<sup>258</sup> More public condemnations, calls for moratoriums, and claims that the death penalty was uncivilized and should be abolished followed—from both the left and the right.<sup>259</sup>

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<http://www.washingtonpost.com/blogs/post-partisan/wp/2014/04/30/oklahomas-horrible-botched-execution-shows-again-why-the-death-penalty-should-be-abolished>; Alice P. Green, *Death Penalty in America Immoral and Discriminatory*, TIMES UNION (May 12, 2014, 4:30 PM), <http://www.timesunion.com/opinion/article/Death-penalty-in-America-immoral-and-5472087.php>; Editorial, *Reminders in Texas, Okla. to End the Death Penalty*, SEATTLE TIMES (May 15, 2014, 4:03 PM), [http://seattletimes.com/html/editorials/2023619669\\_editdeathpenalty16xml.html](http://seattletimes.com/html/editorials/2023619669_editdeathpenalty16xml.html); Jesse Wegman, Op-Ed., *There Is No Such Thing as a ‘Clean’ Execution*, N.Y. TIMES (June 5, 2014, 2:24 PM), <http://takingnote.blogs.nytimes.com/2014/06/05/there-is-no-such-thing-as-a-clean-execution>.

257. Editorial, *Let’s Stop Pretending the Death Penalty Is a Medical Procedure*, SCI. AM. (May 1, 2014), <http://www.scientificamerican.com/article/lets-stop-pretending-the-death-penalty-is-a-medical-procedure-editorial>; see also John Caniglia, *Lawmakers Seek Alternatives to Lethal Injection, as Death Penalty Becomes Mired in Litigation*, CLEVELAND.COM (Feb. 22, 2014, 9:00 PM), [http://www.cleveland.com/metro/index.ssf/2014/02/state\\_lawmakers\\_seek\\_alternati.html](http://www.cleveland.com/metro/index.ssf/2014/02/state_lawmakers_seek_alternati.html) (quoting a pediatric surgeon as referring to lethal injection as a “medical charade”).

258. *Don’t Botch Executions. End Them*, BLOOMBERGVIEW (Aug. 5, 2014, 11:53 AM), <http://www.bloombergview.com/articles/2014-08-05/don-t-botch-executions-end-them>. The execution took almost two hours, during which time one reporter counted 660 gulps and gasps for air. See Mauricio Marin, *Witness to a 2-Hour Arizona Execution: Joseph Wood’s Final 117 Minutes*, GUARDIAN (July 24, 2014, 7:35 AM), <http://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died>. When the condemned inmate’s attorney asked a federal judge to stop the execution after the first hour, the Arizona Attorney General’s Office answered that there was no point; the inmate was “already brain-dead” and what was happening was “the type of reaction one gets if they were taken off of life support.” Michael Kiefer, *Arizona Officials Deny Execution Was Botched*, ARIZ. REPUBLIC (July 25, 2014, 9:09 AM), <http://www.azcentral.com/story/news/arizona/politics/2014/07/25/arizona-officials-deny-execution-botched/13145329>. In any event, a second dose had been given to finish the execution. *Id.* It later came to light that the state had administered fifteen doses of the lethal injection protocol in its efforts to execute the inmate. See Cindy Carcamo, *After First Drug Dose Failed to Kill Arizona Inmate, Logs Show 14 More*, L.A. TIMES (Aug. 2, 2014, 9:46 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-botched-execution-15-doses-20140801-story.html>. The State of Arizona maintains that the execution was not botched. See Kiefer, *supra*.

259. One comment captured the phenomenon perfectly: “The marketplace of ideas over lethal injections is flourishing—a great national debate on the issue arises every time a man is tortured to death like this.” Andrew Cohen, *The Disturbing Lessons of Arizona’s Un-American Execution*, THE WEEK (July 24, 2014), <http://theweek.com/article/index/265274/the-disturbing-lessons-of-arizonas-un-american-execution>. For others, see, e.g., Jay Bookman, *Yes, It’s Time to Abolish the Death Penalty*, ATLANTA J.-CONST. (July 24, 2014, 9:42 AM), <http://www.ajc.com/weblogs/jay-bookman/2014/jul/24/yes-its-time-abolish-death-penalty>; *Botched Execution Demonstrates Debacle of Death*, S.F. CHRON. (July 24, 2014, 5:56 PM), <http://www.sfgate.com/opinion/editorials/article/Botched-execution-demonstrates-debacle-of-death-5645595.php>; Lawrence Hummer, *Botched or Not, Executions Go Against Basic Humanity*, U.S. NEWS & WORLD REP. (July 28, 2014, 5:00 PM), <http://www.usnews.com/debate-club/do-botched-executions-make-the-case-for-abolishing-the-death-penalty/botched-or-not-executions-go-against-basic-humanity>; David Schwartz, *Lawyers Call for Outside Probe of ‘Bungled’ Arizona Execution*, REUTERS (July 24, 2014), <http://www.reuters.com/article/2014/07/24/us-usa-execution-arizona-idUSKBNOFT1BS20140724>; Editorial, *Stop the Death Penalty—Now*, ARIZ. REPUBLIC (July 24, 2014, 10:51 AM), <http://www.azcentral.com/story/opinion/editorial/2014/07/23/moratorium-death-penalty-needed/>



If abolitionists are right in claiming that public detachment is what allows the death penalty in America to continue, and if, in turn, public detachment depends on executions being conducted outside the public purview and with “the trappings of a clinical procedure,”<sup>260</sup> then the potential impact of these developments is tremendous.<sup>261</sup> For members of the general public, executions used to be out of sight, out of mind. Now that is no longer true.

Indeed, even if states were to turn to other execution methods (and several have passed legislation to do just that),<sup>262</sup> Americans would still have to confront the violence inherent in taking another human being’s life. Death by shooting, hanging, gas, or electrocution—all these may be harder for foreigners to interfere with, but they are also more grisly. Their violence is apparent, which may undermine the stability of capital punishment in America even more.<sup>263</sup> “There’s no nice way to kill people, and this is part of that dilemma that the death penalty presents,” says Richard Dieter of the Death Penalty Information Center.<sup>264</sup> That has always been true. The difference is that now Americans have to deal with it.

“Why now?” insiders ask. As already noted, botched executions have been happening for decades.<sup>265</sup> They just have not garnered the same amount of

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13079539; Editorial, *Why the U.S. Should End the Death Penalty*, WASH. POST (July 26, 2014), [http://www.washingtonpost.com/opinions/why-the-us-should-ditch-the-death-penalty/2014/07/26/fd42167a-143f-11e4-9285-4243a40ddc97\\_story.html](http://www.washingtonpost.com/opinions/why-the-us-should-ditch-the-death-penalty/2014/07/26/fd42167a-143f-11e4-9285-4243a40ddc97_story.html). For similar calls from conservatives, see, e.g., Casey Given, *The Death Penalty Is Big Government at Its Worst*, DAILY CALLER (July 25, 2014, 2:39 PM), <http://dailycaller.com/2014/07/25/the-death-penalty-is-big-government-at-its-worst>; Drew Johnson, *A Conservative Case Against the Death Penalty*, WASH. TIMES (July 25, 2014), <http://www.washingtontimes.com/news/2014/jul/25/johnson-a-conservative-case-against-the-death-pena>.

260. See RICHARD A. STACK, *GRAVE INJUSTICE: UNEARTHING WRONGFUL EXECUTIONS* 193 (2013) (quoting Sister Helen Prejean); see also JEREMY MERCER, *WHEN THE GUILLOTINE FELL* 152–53 (2008) (discussing the privatization of guillotine executions and Albert Camus’s claim that “[i]f people are shown the machine, made to touch the wood and steel and to hear the sound of a head falling, then public imagination, suddenly awakened, will repudiate both the vocabulary and the penalty”).

261. See Fretland, *supra* note 252 (quoting Death Penalty Information Center’s Richard Dieter as stating, “This could be a real turning point in the whole debate as people get disgusted by this sort of thing.”).

262. See Erik Schelzig, *Gov. Haslam Signs Bill to Allow Electric Chair in Tennessee*, TENNESSEAN (May 23, 2014, 8:27 AM), <http://www.tennessean.com/story/news/politics/2014/05/22/gov-haslam-signs-bill-allow-electric-chair-tennessee/9466279>; *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (April 5, 2015, 7:15 PM), <http://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one>; Kim Bellware, *Oklahoma Adds Nitrogen Gas Chamber to Its Execution Methods*, HUFFINGTON POST, (April 17, 2015, 5:53 PM), [http://www.huffingtonpost.com/2015/04/17/oklahoma-gas-execution\\_n\\_7089416.html](http://www.huffingtonpost.com/2015/04/17/oklahoma-gas-execution_n_7089416.html). Other states are considering their options. See Chantal Valery, *US States Mulling Execution Methods Amid Drug Shortage*, NEWS 24 (Feb. 4, 2014, 8:08 AM), <http://www.news24.com/World/News/US-mulls-execution-methods-amid-drug-shortage-20140204>.

263. See Caniglia, *supra* note 257 (quoting one state legislator as saying, “More and more people in Ohio will say, ‘Let’s get the firing squad. Let’s get Old Sparky,’ and to me that’s just wrong. It’s immoral.”).

264. Jim Salter, *Shortage of Execution Drugs Becomes More Acute*, ASSOCIATED PRESS (Feb. 18, 2014, 6:29 PM), <http://bigstory.ap.org/article/okla-pharmacy-wont-give-drug-mo-execution>.

265. See *supra* note 247 and accompanying text.

attention in the popular press.<sup>266</sup> This past year, fallout from Oklahoma's botched execution was named one of the "Top 10 Stories of 2014,"<sup>267</sup> a testament to the newfound salience the issue has achieved. Now botched executions, and the spotlight on the death penalty that has come with them, are not only headline news, but also the subject of political satires and late night comedy news shows.<sup>268</sup> What gives?

Several possible explanations come to mind. Press coverage of the shortage of death penalty drugs had already captured the public's attention.<sup>269</sup> 2014's spate of botched executions made them particularly salient.<sup>270</sup> And perhaps, as already discussed, other events had already made the American public deeply ambivalent about the death penalty.<sup>271</sup> Whatever the reason, our point is this: the most recent botched lethal injections have had a profound effect on America's death penalty discourse and in so doing, they offer a vivid example of the international moral marketplace's impact on the cultural conception of capital punishment in the United States.

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266. As a stirring example of the phenomenon, graphic photos of Angel Diaz's botched execution by lethal injection in 2006 resulted in a full-length article on the incident—but not until May 2014. See Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), <http://www.newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida>; see also Michael Graczyk, *Some Lethal Injection Problems in US Executions*, ASSOCIATED PRESS, (Apr. 30, 2014, 3:18 PM), <http://bigstory.ap.org/article/some-lethal-injection-problems-us-executions> (discussing botched executions by lethal injection in 1988, 1992, 1994, 1995, 1996, 1998, 2006, 2009, and 2014). To be clear, this is not to say that prior botched executions have received *no* attention in the popular press. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997) (studying accounts of botched executions and citing press coverage of those events); Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 270 (2009) (discussing the botched executions of Angel Diaz in 2006 and Tookie Williams in 2005, and citing press coverage of those events).

267. Michelle Charles, *Top 10 Stories of 2014—No. 4: Fallout from Botched Execution Brings Death Penalty Challenges*, STILLWATER NEWS PRESS (Dec. 27, 2014, 6:00 AM), [http://www.stwnewspress.com/news/top-stories-of—no-fallout-from-botched-execution/article\\_b4606b8e-8d7d-11e4-ade6-b71e24a226fc.html](http://www.stwnewspress.com/news/top-stories-of—no-fallout-from-botched-execution/article_b4606b8e-8d7d-11e4-ade6-b71e24a226fc.html).

268. See, e.g., *The Colbert Report* (Comedy Central television broadcast Apr. 2, 2014), available at <http://thecolbertreport.cc.com/videos/o639ag/the-word—silent-but-deadly>; *The Colbert Report* (Comedy Central television broadcast Jan. 20, 2014), available at <http://thecolbertreport.cc.com/videos/bg48ms/the-word—thrift-justice>; *Johnson & Johnson Hoping Brand Won't Be Tarnished If They Dip into Lethal Injection Game*, THE ONION (Sept. 19, 2014), <http://www.theonion.com/articles/johnson-hoping-brand-wont-be-tarnished-if,36965>; The Onion, *Ohio Replaces Lethal Injection with Humane New Head-Ripping-Off Machine*, THE ONION (May 20, 2014), <http://www.theonion.com/video/ohio-replaces-lethal-injection-with-humane-new-hea,36077>.

269. See *supra* notes 227–28 and accompanying text.

270. The four botched executions discussed in text all occurred in 2014, earning it the dubious title as the worst year ever for lethal injection. See Ben Crair, *2014 Is Already the Worst Year in the History of Lethal Injection*, NEW REPUBLIC (July 24, 2014), <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history>.

271. For a discussion of factors that made the nation deeply ambivalent about the death penalty even before the advent of the moral marketplace, see *supra* Part III.B.1.

#### 4. Newfound Space in the Domestic Death Penalty Discourse

As a final point, it is worth noting that the newfound salience of botched executions has done more than just help bring the human rights critique of the death penalty home. It has also created space in the public discourse to talk about the death penalty's other perceived failings—flaws that death penalty opponents have been talking about for years, but without an audience primed to listen. The Justice Department's decision to launch a full-scale review of the death penalty in the wake of Lockett's botched execution illustrates the point,<sup>272</sup> as do President Obama's remarks about the review:

[R]acial bias, uneven application of the death penalty, situations in which there were individuals on death row who later were discovered to have been innocent . . . . All of these, I think, do raise significant questions about how the death penalty is being applie[d] . . . . I think we do have to, as a society, ask ourselves some difficult and profound questions.<sup>273</sup>

Granted, Obama's remarks once again cast the problem with the death penalty in utilitarian terms. But before the high-profile botched executions, before the shortage of death penalty drugs brought on by the E.U.'s boycott, there was no full-scale review at all, and presidential remarks on the subject were nothing more than opportunities to burnish law-and-order credentials.

Now the optics of the death penalty have changed, and a new narrative has entered the discourse. The old narrative is still around: no matter how botched the execution, the condemned still die a death more civilized than that suffered by their victims. But a different narrative is garnering attention. States determined to get their pound of flesh are willing to go to untold lengths to do it—shielding their protocols from meaningful scrutiny,<sup>274</sup> using untested drugs from underregulated providers,<sup>275</sup> rushing to execute before

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272. See Ben Wolfgang, *Obama: Time for 'Difficult and Profound Questions' About Death Penalty*, WASH. TIMES (May 2, 2014), <http://www.washingtontimes.com/news/2014/may/2/obama-justice-dept-review-death-penalty-procedures>. Whether anything will come of this review is, of course, another matter. Although Attorney General Holder had initially stated that he hoped the review would be completed before he left office, he has now stated that it will take longer to complete. In the meantime, and in response to the Supreme Court's grant of certiorari in *Glossip v. Gross*, see *infra* note 339, the Attorney General has called for a moratorium on executions altogether, see Lydia Wheeler, *Holder Calls for Halt to US Executions*, THE HILL (Feb. 17, 2015, 2:11 PM), <http://thehill.com/regulation/administration/232979-holder-calls-for-halt-to-us-executions>.

273. Wolfgang, *supra* note 272.

274. See Andrew Cohen, *Oklahoma's Courts Are at War over Lethal-Injection Secrecy*, ATLANTIC (April 21, 2014, 1:55 PM), <http://www.theatlantic.com/national/archive/2014/04/Oklahoma/360940> ("You cannot sustain an Eighth Amendment claim here unless you can establish that the drugs to be used will cause pain to the condemned . . . and you cannot prove that they'll cause pain because you have no right to demand that state officials share information about the drugs with you. . . . The conflict today is about secrecy and transparency—not guilt or innocence or crime or punishment.").

275. See Tara Lai Quinlan, *Relying on Untested Execution Drugs Raises Important Health, Safety and Human Rights Concerns*, HUFFINGTON POST (Feb. 23, 2014, 10:01 AM), <http://www.huffingtonpost.com>.

appeals are decided,<sup>276</sup> even threatening judges who attempt to step into the fray.<sup>277</sup> America's discourse about the death penalty is increasingly turning from the wrongs of the offender to the wrongs of the state, from the need for retribution to the need for due process protections—a marked turn indeed.

In the end, what we see is textbook Koh, but with a twist. Koh's model of transnational legal process involves repeated, iterative interactions with a foreign norm—first resisted, then obeyed out of convenience, and then (maybe, eventually) assimilated into domestic law.<sup>278</sup> Applying Koh's analytic framework, we see American exceptionalism and isolationism on the death penalty at the start. Resistance, check. Then we see the advent of the moral marketplace forcing some degree of conformity with international norms, executions put on hold if only because states could not get the drugs. Obedience out of convenience (or at least disobedience disturbed out of inconvenience), check.

That leaves assimilation. The moral marketplace's second-order effects have provided another iteration—another encounter with the norm, and one that has generated attention and opposition to the death penalty where it did not exist before. The twist is that all this is happening outside the law, using the behavior-regulating modalities of the market and culture instead.

#### C. INTERNATIONAL NORMS IN EIGHTH AMENDMENT DOCTRINE

At this point, we have seen the influence of foreign norms through the moral marketplace. And we have seen the influence of those norms move from the market to the modality of culture as well. Up next we bring the analysis full circle, showing how the influence of foreign norms in the market and culture is so pervasive that it is now in a position to move back into the positive law—although not as Koh would predict. In the death penalty context, international norms are poised to impact the positive law through the backdoor of domestic doctrine, allowing for expression without the need for explicit recognition at all. Below we discuss three prime examples of doctrine porous enough for this to occur: the “evolving standards of decency” doctrine; the legitimate penological purpose test; and the doctrine of *Baze v. Rees*.

##### 1. The Evolving Standards of Decency Doctrine

One way international norms may impact the law of capital punishment, even without explicit recognition, is through the Eighth Amendment's evolving

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com/tara-lai-quinlan/untested-execution-drugs\_b\_4490351.html (discussing various concerns about compounded drugs and compounding pharmacies).

276. See *supra* note 87 and accompanying text (noting execution occurred while the condemned's petition for rehearing was pending).

277. See Andrew Cohen, *Oklahoma Just Neutered Its State Supreme Court*, WEEK (Apr. 29, 2014), <http://theweek.com/article/index/260632/oklahoma-just-neutered-its-state-supreme-court> (discussing constitutional showdown that preceded botched Clayton Lockett execution and impeachment proceedings instituted against the five Oklahoma Supreme Court justices who granted a stay in the case, and who the next day lifted it).

278. See, e.g., Koh, *supra* note 1, at 1399.

standards of decency doctrine. Under the evolving standards doctrine, a punishment practice violates the Cruel and Unusual Punishments Clause when a national consensus has formed against it.<sup>279</sup> In determining whether such a consensus exists in the death penalty context, the Supreme Court considers a number of factors, including the majority position among the states,<sup>280</sup> decisionmaking trends among the states,<sup>281</sup> the number of death sentences,<sup>282</sup> the number of executions<sup>283</sup>—and *sometimes* public opinion poll data,<sup>284</sup> the stance of professional organizations,<sup>285</sup> and international norms.<sup>286</sup> Knowing that, how might international norms affect how the doctrine plays out?

The most obvious avenue of influence is executions. International anti-death-penalty norms have created a shortage of death penalty drugs. The shortage itself has caused executions to be put on hold, but it also has led to legally suspect state responses (substitutes, speed, and secrecy) that have in turn created litigation opportunities to put more executions on hold.<sup>287</sup> So long as the number of executions remains a key indicator of society's evolving standards of decency, international norms will influence how the doctrine plays out, and that is true whether the Justices recognize those norms or not.

Although perhaps less obvious, one can see how international norms expressed through the moral marketplace could impact other considerations under

279. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–67, 578 (2005) (invalidating the juvenile death penalty upon finding that a national consensus had formed against it); *Atkins v. Virginia*, 536 U.S. 304, 315–16, 321 (2002) (invalidating the death penalty for mentally retarded offenders for the same reason); *Stanford v. Kentucky*, 492 U.S. 361, 370–73, 380 (1989) (upholding the juvenile death penalty upon finding of insufficient evidence of a national consensus against it), *abrogated by Roper*, 543 U.S. 551; *Penry v. Lynaugh*, 492 U.S. 302, 334–35, 340 (1989) (upholding the death penalty for mentally retarded offenders for the same reason), *abrogated by Atkins*, 536 U.S. 304. The doctrine ultimately asks the Justices to use their “independent judgment,” see *Roper*, 543 U.S. at 563–64, but we focus here on the national consensus portion of the test because that is where the influence of international norms is most likely to play out.

280. State legislative judgments are “[t]he clearest and most reliable objective evidence of contemporary values,” *Penry*, 492 U.S. at 331; *accord Stanford*, 492 U.S. at 369–70; *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion). Which states, you might ask—all states or only those with the death penalty? The answer is it depends; the Justices have gone back and forth on this question too. See Lain, *supra* note 131, at 26, 30–31 (discussing the Justices’ changing baseline for state counting).

281. See *Atkins*, 536 U.S. at 315–16 (considering the direction of state legislative change).

282. See *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (“[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.” (quoting *Gregg*, 428 U.S. at 181)); *accord Stanford*, 492 U.S. at 373–74 (considering jury sentencing data under “evolving standards” analysis); *Enmund v. Florida*, 458 U.S. 782, 793–94 (1982).

283. See, e.g., *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 564–65.

284. See, e.g., *Atkins*, 536 U.S. at 316 n.21; *Penry*, 492 U.S. at 334–35.

285. See, e.g., *Atkins*, 536 U.S. at 316 n.21; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

286. See *supra* notes 173–80 and accompanying text (discussing decisions going both ways).

287. As previously noted, 2014 saw just 35 executions. See *supra* note 202. That figure is the lowest in 20 years. See *id.* Equally remarkable is the fact that eighty percent of those executions occurred in just three states: Texas, Missouri, and Florida, which together accounted for 28 of those 35 executions. See *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Jan. 31, 2015).

the evolving standards test as well. Take the states' position on the death penalty, for example. As previously noted, six states have abolished the death penalty in the last eight years. Not yet mentioned is why they did so—cost, and what the states were getting for it, played a critical role in each of those state decisions. Illinois reported that it had spent some \$100 million on the death penalty in the ten years prior to its abolition in 2011 and had executed no one during that time.<sup>288</sup> New York estimated that it had spent \$170 million on the death penalty, while New Jersey's estimate was \$253 million—and neither of those states had a single execution to show for it.<sup>289</sup> New Mexico, Connecticut, and Maryland all had a similar story to tell; high costs, a host of problems, and little bang for the buck made the death penalty an unattractive penological proposition.<sup>290</sup> So they decided to stop proposing it.

In short, exorbitant costs with few or no executions to show for them are key components of the calculus that has led states to abandon the death penalty altogether in recent years. And the shortage of lethal injection drugs—a direct result of the moral marketplace—figures into that calculus in two ways. First, as just noted, it has had a dramatic effect on states' ability to execute, both because they lack the lethal injection drugs to do it and because they have responded in ways that have spawned litigation, providing yet another reason to put executions on hold. Second, and perhaps less obvious, the advent of the moral marketplace has significantly increased the cost of the death penalty for states that still execute, not so much because the cost of the drugs has increased (although it has),<sup>291</sup> but because the litigation that has ensued over substitutes and secrecy, and the time lag that has come with it, is exceptionally costly in its

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288. See *Illinois House Votes to End Death Penalty: Should States Abolish Capital Punishment to Cut Costs?*, ABC NEWS (Jan. 7, 2011), <http://abcnews.go.com/WN/illinois-house-votes-end-death-penalty-states-abolish/story?id=12563165#.UGdmj02HK6o>.

289. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14 (2009).

290. See *id.* at 13 (discussing New Mexico's rationale for ending the death penalty); David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012, 5:41 PM), <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed> (discussing Connecticut's rationale for ending the death penalty); Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013, 5:15 PM), <http://www.reuters.com/article/2013/05/02/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502> (discussing Maryland's rationale for same).

291. The cost of death penalty drugs has quadrupled over the last several years, with the latest estimate being \$1500 for a single, lethal dose of compounded pentobarbital. See Michael Graczyk, *Records: Texas Has Enough Drugs for 5 Executions*, DALLAS MORNING NEWS (Dec. 22, 2014, 2:01 PM), <http://www.dallasnews.com/news/state/headlines/20141222-records-texas-has-enough-drugs-for-5-executions.ece>; see also Molly Hennessy-Fiske, *Death Penalty: Cost of Execution Drugs—and Executions—Rises*, L.A. TIMES (Feb. 24, 2012), <http://articles.latimes.com/2012/feb/24/nation/la-na-nn-execution-drugs-20120224> (noting that Texas's cost for one dose of its three-drug lethal injection protocol was \$83.55 in 2011, but with its new one-drug protocol of pentobarbital, the one-drug cost for each execution had grown to \$1,286.86). That new, higher cost, however, is a mere drop in the bucket of the death penalty's total costs. See *Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/costs-death-penalty> (last visited July 27, 2014).

own right.<sup>292</sup> International abolitionist norms and their second-order effects have increased the cost of the death penalty and decreased what states get for it, making both sides of calculus increasingly acute.

For diehard death penalty states like Texas, such dynamics are unlikely to make a difference.<sup>293</sup> But for states already on the fence about the death penalty, the dearth of death penalty drugs and its second-order effects may be the very thing that tips the scales in favor of abolition.<sup>294</sup> Seven states are already considered to be de facto abolitionist because they have gone more than ten years without an execution.<sup>295</sup> Another five have not had an execution in at least eight years.<sup>296</sup> Although the evolving standards doctrine is unlikely to lead to nationwide judicial abolition of the death penalty anytime soon, one can imagine a number of states walking away from the death penalty in the future if the current dynamics continue, leaving just a handful of states strongly committed to the execution enterprise. At that point, the Supreme Court just might turn off the lights.<sup>297</sup> Again, we recognize the myriad of destabilizing forces already contributing to that tipping point on the domestic side; our point is that the

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292. Housing death row inmates is one of the most expensive aspects of the death penalty, so time is truly money. A 2008 study by the California Commission on the Fair Administration of Justice concluded:

The costs of confinement can . . . be estimated with some precision, based upon the Department of Corrections estimate that confinement on death row adds \$90,000 per year to the cost of confinement beyond the normal cost of \$34,150. Thus, just the enhanced confinement costs for the 670 currently on California's death row totals \$63.3 million.

CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 146 (2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>. For a comprehensive listing of facts about costs of the death penalty in the various states, see *Costs of the Death Penalty*, *supra* note 291.

293. Texas is the national leader in executions, having executed 522 people since the death penalty's reinstatement in 1976. Oklahoma is a distant second, having executed 112 executions during that time. See *Number of Executions by State and Region Since 1976*, *supra* note 287; see also David R. Dow, *Why Texas Is So Good at the Death Penalty*, POLITICO MAG. (May 15, 2014), <http://www.politico.com/magazine/story/2014/05/texas-death-penalty-106736.html> (“[K]illing people is like most anything else; the more you do it, the better you get.”).

294. See Fleischer, *supra* note 227 (“It takes a strong commitment and political will to execute someone these days . . . . If you get a state that's already on the fence, like Maryland, when the lethal injection issue comes along because of European sanctions, they throw up their hands. The chemicals become one more frustrating problem . . . .” (internal quotation marks omitted)). Interestingly, three of a recently published list of five reasons to end the death penalty can be traced back to second-order effects of the moral marketplace. See Kevin Mathews, *5 Reasons to End the Death Penalty Now*, CARE2 (Aug. 12, 2014, 2:30PM), <http://www.care2.com/causes/5-reasons-to-end-the-death-penalty-now.html> (listing the five reasons as: first, it is arguably unconstitutional because it “only actually kills a small fraction of the prisoners sentenced to death”; second, botched executions; third, “[s]tates [a]re [r]esorting to [s]hady [b]ehavior to [e]nsure [e]xecutions [c]ontinue”; fourth, innocents are killed; and fifth, “[i]t's [r]acist”).

295. See *Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited July 27, 2014) (listing Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania, and Wyoming).

296. See *id.* (listing Arkansas, California, Montana, Nevada, and North Carolina).

297. This is essentially the story of *Furman v. Georgia*, 408 U.S. 238 (1972). See Lain, *supra* note 114, at 22–25 (discussing state trend toward abolition of capital punishment and noting that in the states

advent of the moral marketplace has added a significant, and salient, destabilizing force of its own. International norms may just be piling on, but they had never been an appreciable part of the pile before.

Yet another indicator under the evolving standards doctrine is public support for the death penalty as measured by public opinion poll data, and here too the second-order effects of international norms may find expression. As previously mentioned, public support for the death penalty from 2000–2010 ranged between 64%–70%.<sup>298</sup> Support for the death penalty since 2011 has ranged from 61%–63%, the lowest in thirty-five years<sup>299</sup>—and at one point dipped to 60%, the lowest in over forty years.<sup>300</sup> Moreover, a June 2014 poll showed that now only 42% of Americans support the death penalty when the alternative is life without the possibility of parole,<sup>301</sup> while a poll the previous month showed that one in three people are ready to give up on the death penalty altogether if “drug shortages and other problems” render lethal injection no longer viable.<sup>302</sup> The most recent Gallup poll from October 2014 showed support for the death penalty at a low but stable 63%,<sup>303</sup> and another national poll revealed death penalty support at an even lower 57%.<sup>304</sup> Regardless of which poll is right, our point is this: to the extent public opinion poll data remains a consideration under the evolving standards doctrine, and to the extent international norms have had second-order effects that impact public support for the death penalty, those norms will find expression in even purely domestic death penalty doctrine.

Indeed, one can even imagine that the direct and second-order effects of international anti-death-penalty norms could affect the number of death sentences imposed. Maybe they already have. The year 2011 marked the first time in thirty-five years that death sentences dropped below 100.<sup>305</sup> And death sentences over the past four years (80 in 2011, 79 in 2012, 80 in 2013, and 72 in

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where it remained, “death penalty laws were on the books, but with one regional exception—the South—they were rarely invoked in practice”).

298. See *supra* note 217 and accompanying text. The average for that decade was 66%. See *Death Penalty*, *supra* note 216.

299. See Lydia Saad, *U.S. Death Penalty Support Stable at 63%*, GALLUP (Jan. 9, 2013), <http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx>.

300. See Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More than 40 Years*, GALLUP (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx>.

301. See Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014, 7:00 AM), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty>.

302. Tracy Connor, *Americans Back Death Penalty by Gas or Electrocution If No Needle: Poll*, NBC NEWS (May 15, 2014), <http://www.nbcnews.com/storyline/lethal-injection/americans-back-death-penalty-gas-or-electrocution-if-no-needle-n105346>.

303. See Jeffrey M. Jones, *Americans' Support for Death Penalty Stable*, GALLUP (Oct. 23, 2014), <http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx>.

304. See *Americans Are Still Pro-Death Penalty*, RASMUSSEN REPORTS (Feb. 6, 2015), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/february\\_2015/americans\\_are\\_still\\_pro\\_death\\_penalty](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/february_2015/americans_are_still_pro_death_penalty).

305. See *Death Sentences by Year: 1976–2012*, *supra* note 220; *Year End: 2014–2014 Death Sentences by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/YearEnd2014#deathsentences> (last visited Feb. 15, 2015).



2014) marked one of the lowest annual tallies in United States history.<sup>306</sup> Perhaps the timing is pure coincidence, and the decline has nothing to do with the dearth of death penalty drugs and its related effects. But one can see how it could. To the extent that the direct and second-order effects of international abolitionist norms have decreased public support for the death penalty and increased unease (and uncertainty) as to how the sentence will be carried out, one would expect juries to be less likely to return death sentences, and prosecutors to be less interested in chasing them.<sup>307</sup> Here again, insofar as the second-order effects of international norms impact the tally of death sentences, they will impact how the evolving standards doctrine plays out.

In short, many, if not most, of the doctrinally significant considerations under the evolving standards doctrine offer opportunities for international norms to find expression. Whenever those norms impair states' ability to execute, or impact their larger calculus on whether to keep capital punishment, or reduce public support for the death penalty, or influence juries' willingness to impose it and prosecutors' interest in seeking it, they will have an effect on how the evolving standards doctrine plays out. And that is true whether those norms are explicitly recognized in the doctrine or not.

## 2. The Penological Purpose Test

A second way that foreign norms may find expression in Eighth Amendment doctrine, even if not formally recognized, is through the constitutional requirement that punishments serve some legitimate penological purpose. The Supreme Court has steadfastly maintained that under the Cruel and Unusual Punishments Clause, a punishment "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."<sup>308</sup>

In the death penalty context, we have a pretty good idea of what it would take to fail the test. As Justice White stated in his concurrence in *Furman v. Georgia*, we start with the "near truism" that capital punishment "could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."<sup>309</sup> As he went on to explain:

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306. See *Death Sentences by Year: 1976–2012*, *supra* note 220; see also *Furman v. Georgia*, 408 U.S. 238, 291–92 & n.41 (1972) (Brennan, J., concurring) (listing the number of death sentences imposed from 1961 to 1970); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 244, 279 (2002) (noting an average of 142 death sentences between 1935–1942, an average of 113 death sentences by the 1960s, when the abolition movement was at its peak, and a surge in death sentences in the wake of *Furman*).

307. See *supra* note 219 and accompanying text (discussing how public support for the death penalty impacts death sentences, both in terms of juries' willingness to impose a death sentence and in terms of prosecutors' willingness to use their scarce resources to vie for them).

308. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); accord *Baze v. Rees*, 553 U.S. 35, 52 (2008); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

309. *Furman*, 408 U.S. at 311 (White, J., concurring).

At the moment that [the death penalty] ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.<sup>310</sup>

For Justice White, this is exactly what had become of the death penalty in 1972. It was a punishment “so infrequently imposed that the threat of execution [was] too attenuated to be of substantial service to criminal justice.”<sup>311</sup> Other Justices in *Furman* had other theories for why the death penalty was cruel and unusual, but all five in the majority theorized from a common point of fact: the death penalty’s infrequent use.<sup>312</sup>

Think history would never repeat itself? Think a court would never find the threat of execution to be so attenuated that the death penalty ceased to be of substantial service to criminal justice? In July 2014, a federal district court judge in California did just that:

In California, the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had. Such an outcome is antithetical to any civilized notion of just punishment. . . .

. . . .  
. . . Such a system is unconstitutional.<sup>313</sup>

Indeed, the court explained, California’s death penalty in practice amounts to a sentence that “no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*.”<sup>314</sup> Problems with California’s lethal injection protocol, which had been the subject of litigation since at least 2006, were but a small part of the massive dysfunction that drove the court’s ruling, but in the end, they were what stood between life and death. Even those death row inmates who made their way through the quagmire of California’s post-conviction review system and were awaiting execution would not see the executioner anytime soon—because the state had no valid lethal injection protocol by which to put the condemned to death.<sup>315</sup>

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310. *Id.* at 312.

311. *Id.* at 313.

312. *See* Lain, *supra* note 114, at 15 (discussing the five majority opinions in *Furman*).

313. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1063–69 (C.D. Cal. 2014). The decision is now under appeal in the Ninth Circuit, with the California Attorney General having filed the opening brief on December 1, 2014. *See* James Ching, *AG Files Opening Brief in Jones v. Chappell California Death Penalty Appeal*, LAW.COM (Dec. 3, 2014), <http://www.law.com/sites/jamesching/2014/12/03/ag-files-opening-brief-in-jones-v-chappell-california-death-penalty-appeal>.

314. *Jones*, 31 F. Supp. 3d at 1053.

315. *Id.* at 1055 n.7.

Because the penological purpose test considers the frequency of death sentences and executions in determining whether the death penalty fails to serve a penological purpose,<sup>316</sup> we need not belabor the point. To the extent the international drug boycott and its second-order effects impact executions or death sentences here at home, they stand to influence the way the Supreme Court's penological purpose test plays out. Again, constitutional doctrine can explicitly disavow the influence of foreign norms, but that does not mean foreign norms are not making their way into constitutional doctrine. Foreign norms are having their say whether we recognize them explicitly or not.

### 3. *Baze v. Rees*

The 2008 decision in *Baze v. Rees* provides the Supreme Court's only doctrinal framework specific to lethal injection to date,<sup>317</sup> and it too allows for foreign norms to influence Eighth Amendment jurisprudence with or without the Justices' imprimatur. As explained below, it does so in three ways.

*Baze* was a deeply splintered decision,<sup>318</sup> but to the extent it had a takeaway, it was this: lethal injection protocols violate the Eighth Amendment only if they pose "a substantial risk of serious harm" in light of "feasible, readily implemented" alternatives.<sup>319</sup> Applied to the facts of that case, the standard was not met; the states basically all used the same three-drug protocol, so there were no ready alternatives to the cocktail Kentucky used.<sup>320</sup> Indeed, the Court was explicit in saying that not only was Kentucky's three-drug protocol constitutional, but so was any protocol "substantially similar" to Kentucky's.<sup>321</sup> The message to death penalty states was clear: if you want your lethal injection protocols to pass constitutional muster, do as Kentucky does.

And states did—until they could not get the drugs. As previously discussed, foreign norms operating through the moral marketplace took sodium thiopental

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316. See *Furman*, 408 U.S. at 313 (White, J., concurring); accord *Gregg v. Georgia*, 428 U.S. 153, 181–83 (1976).

317. See *infra* note 339 and accompanying text (noting the Supreme Court's grant of certiorari in *Glossip v. Gross*, challenging Oklahoma's lethal injection protocol).

318. The Supreme Court's opinion in *Baze* represented the views of a three-person plurality and was accompanied by six other opinions in the case. See generally *Baze v. Rees*, 553 U.S. 35 (2008).

319. *Id.* at 50–52 (internal quotation marks omitted).

320. The plurality opinion mentioned that all thirty-six death penalty states allow for lethal injection, and that at least thirty of them use the same three-drug protocol. *Id.* at 44. The remaining six states were almost certainly not using a different protocol; rather, the information about their protocol was likely unavailable, perhaps because it was nonexistent, given that those states had not executed anyone since 1999, despite having the death penalty on their books. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 97 (2007) (reporting results of studies in 2001 and 2007, in which "all states that reported their lethal injection drugs shared the same three-chemical combination"); *Jurisdictions with No Recent Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last visited July 27, 2014) (listing seven death penalty states that had not executed anyone since 1999).

321. The Court held that Kentucky's protocol did not pose an "objectively intolerable risk" of severe pain, and it stated that any state "with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Baze*, 553 U.S. at 61–62.

off the market, sending states scrambling for an alternative lethal injection protocol. Some turned to pentobarbital but otherwise kept the three-drug protocol.<sup>322</sup> Some ditched the three-drug protocol altogether, using pentobarbital alone.<sup>323</sup> Some turned to a two-drug protocol; some turned to midazolam hydrochloride or one of the half-dozen other drugs in this veritable alphabet soup.<sup>324</sup> At least one state, Oklahoma, adopted five different protocols just to hedge its bets.<sup>325</sup>

This brings us to the first of three ways in which the E.U.'s death penalty drug boycott could affect the constitutionality of lethal injection under *Baze*. The Justices in *Baze* did not invoke the evolving standards doctrine, but they did apply its herd mentality in upholding Kentucky's three-drug protocol. The fact that other jurisdictions were using the same protocol was a point the Justices returned to again and again.<sup>326</sup> As the plurality put the point, "it is difficult to regard a practice as objectively intolerable when it is in fact widely tolerated."<sup>327</sup>

To the extent *Baze*'s herd mentality holds, that poses a problem for lethal injection today. States are not using the same lethal injection protocol as Kentucky did in *Baze*. And they are not using the same lethal injection protocol as each other. Indeed, the first four executions of 2014 used four different protocols.<sup>328</sup> No longer is there safety in numbers.

The second way foreign norms could influence lethal injection's constitutionality under *Baze* builds off the first: not only are today's protocols different from the one in *Baze* and from each other, but the different drugs used in those protocols may well pose a substantial risk of severe pain.<sup>329</sup> The problem with using pentobarbital rather than sodium thiopental, for example, is that sodium thiopental is an anesthetic; pentobarbital is not. Doctors had used pentobarbital as only a sedative and anticonvulsant.<sup>330</sup> And death penalty states, which had

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322. See *State by State Lethal Injection*, *supra* note 79.

323. See *id.*

324. See *id.*

325. See *id.* (listing Oklahoma's lethal injection protocol as being "at the discretion of the Department of Corrections: a three-drug method beginning with sodium thiopental, pentobarbital, or midazolam, a two-drug procedure using midazolam and hydromorphone, or a lethal dose of pentobarbital alone").

326. See *Baze*, 553 U.S. at 53, 57, 62.

327. *Id.* at 53 (internal quotation marks omitted).

328. See Gregg Zoroya, *Death Penalty Spurs Wild West Scramble for Drugs*, USA TODAY (Mar. 17, 2014, 6:49 PM), <http://www.usatoday.com/story/news/nation/2014/03/09/executions-lethal-injection-drugs-prisons-death-penalty/5866947>.

329. The problem of drug substitutes and experimental drug protocols is separate and apart from the problem of inadequate training of executioners, which existed before *Baze* (and before the advent of the moral marketplace) as well as after. Of course, to the extent new drug protocols require new training, and states do not adjust accordingly, the inadequate training of executioners only exacerbates the risk of severe pain identified as constitutionally impermissible in *Baze*.

330. See *Arthur v. Thomas*, 674 F.3d 1257, 1266 (11th Cir. 2012) (Hull, J., dissenting) (discussing an anesthesiologist's testimony that pentobarbital is used as sedative and is not approved by the FDA as an anesthetic).

been relying on thiopental since the first lethal injection thirty years earlier, were likewise in the dark about proper dosage and administration of pentobarbital for anesthetic purposes.<sup>331</sup>

The same problem was evident when states turned to other drugs. When Ohio tried an untested combination of midazolam hydrochloride (to put the prisoner to sleep) and hydromorphone (to kill him), the execution took twice as long as usual, with the prisoner gasping and convulsing as he died.<sup>332</sup> Similarly gruesome reports followed executions using untested protocols in Florida, Oklahoma, and Arizona.<sup>333</sup> Botched executions may have many causes, but experimental drug protocols warrant a place at the top of the list. Executing prisoners with drugs never intended for anesthesia, let alone execution, does exactly what the Supreme Court in *Baze* said the executioner could not do: subject the condemned to a substantial risk of severe pain.

Third and finally, the advent of the moral marketplace and the international anti-death-penalty norms driving it have caused states to purchase substandard drugs from underregulated providers—again a doctrinally significant development under *Baze*. As previously discussed, death penalty states' reliance on local compounding pharmacies has only exacerbated the substitute drug problem, raising serious questions about the potency and purity of the drugs being used.<sup>334</sup> At least one botched lethal injection was found to have used a contaminated compounded drug,<sup>335</sup> and a national review has recently concluded that state regulation of compounding pharmacies is wholly inadequate.<sup>336</sup> It is hard to imagine such practices satisfying *Baze*'s efficacy requirements.

Indeed, states' reliance on compounding pharmacies, and the need to protect the identity of those pharmacies with secrecy laws, even has the potential to result in new doctrinal developments in constitutional law. As Eric Berger has persuasively argued, death row inmates have plausible Eighth Amendment and due process claims to information about the drugs they will be executed with, if only to access their right to protection under *Baze*.<sup>337</sup> To the extent courts agree,<sup>338</sup> the second-order effects of international abolitionist norms will not

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331. *See id.* 1266–68 (Hull, J., dissenting) (discussing anesthesiologists' testimony about differences between thiopental and pentobarbital and lack of experience in using the latter as an anesthetic); *see also* Denno, *supra* note 15, at 428–29 (describing first lethal injection in 1982); Welsh-Huggins, *supra* note 17 (noting that, when the shortage began, every state that used lethal injection used thiopental).

332. *See supra* note 91 and accompanying text. Ohio's experience caused Louisiana to second-guess an earlier decision to use the same two drugs. *See* Kohler, *supra* note 91 (reporting Louisiana's agreement to delay execution while drugs' effects were studied). By contrast, Arizona was undaunted, announcing plans to switch to the Ohio cocktail. *See* Kiefer, *supra* note 86.

333. *See supra* note 92 and accompanying text.

334. *See supra* notes 98–102 and accompanying text.

335. *See supra* note 103 and accompanying text.

336. *See* Quinlan, *supra* note 275.

337. *See* Berger, *supra* note 112.

338. Thus far, that extent appears to be limited; prisoners have had only temporary success challenging state secrecy and have consistently lost in challenging alternative protocols. *See, e.g.,* Tom Dart, *Texas Prison Officials Ordered to Reveal Source of Lethal Injection Drugs*, *GUARDIAN* (Mar. 27,

only have had their say through the backdoor of existing death penalty doctrine, but also will have led to new doctrinal developments in Eighth Amendment law.

To be clear, our claim is not that foreign anti-death-penalty norms will inevitably impact Eighth Amendment death penalty doctrine in these ways. Our claim is that they have had such a profound impact on the administration of capital punishment in the United States that they are now poised to do so.

One indication of this potential is the fact that on the eve of this Article's going to press, the Supreme Court granted certiorari in *Glossip v. Gross*, agreeing to review the constitutionality of Oklahoma's use of midazolam in its three-drug protocol.<sup>339</sup> In our view, the Justices' decision to revisit *Baze* in light of the proliferation of lethal injection protocols is itself evidence of the impact that the international moral marketplace has had on the administration of the death penalty in the United States. Of course, if the Justices should decide to strike down Oklahoma's protocol for any of the reasons we have discussed here (or perhaps others we have not thought of), they would be unlikely to explicitly cite international norms—other than perhaps to credit European abolitionist sentiment as the reason for the bind executioners currently find themselves in. But whether credited or not, the impact of European abolitionist sentiment would be apparent. Indeed, lack of citation would prove our very point: Through the market for death penalty drugs, international abolitionist norms have disrupted the administration of the death penalty in the United States to such an extent that those norms have moved from the market, to culture, and now (possibly) back into the law—but without any formal, doctrinal recognition at all.

#### CONCLUSION

Recent developments in capital punishment reveal the moral marketplace to be a particularly powerful means of transmission for foreign norms, enriching our understanding of behavior-regulating modalities and international law. And in the domestic legal context, the moral marketplace renders the high-profile debate over the role of international norms a largely academic sideshow. International norms have influenced the administration of the death penalty through the market, through culture, and now stand to do so through doctrine. And that is true no matter what our Supreme Court says.

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2014, 3:09 PM), <http://www.theguardian.com/world/2014/mar/27/texas-prison-reveal-lethal-injection-drugs-source> (noting victories for defense teams in Texas and Oklahoma); Mike Ward, *Abbott Switches Mind on Death Drug Secrecy*, HOUSTON CHRON. (May 29, 2014, 8:33 PM), <http://www.chron.com/news/houston-texas/houston/article/Abbott-switches-mind-on-death-drug-secrecy-5514843.php>. As one doctor complained, "In medicine, the burden of proof is on the doctor to show that something is safe. . . . With the death penalty, the burden of proof has been inverted. These compounds, which are clearly causing patients to suffer, are deemed safe until proven otherwise." Matt McCarthy, *What's the Best Way to Execute Someone?*, SLATE (Mar. 27, 2014, 11:44 PM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/03/death\\_penalty\\_drugs\\_lethal\\_injection\\_executions\\_are\\_so\\_bad\\_that\\_it\\_s\\_time.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/03/death_penalty_drugs_lethal_injection_executions_are_so_bad_that_it_s_time.html).

339. *Glossip v. Gross*, 776 F.3d 721 (10th Cir. 2015), *cert. granted*, 135 S. Ct. 1173 (Jan. 23, 2015) (No. 14-7955).